



Osgoode Hall Law School of York University  
**Osgoode Digital Commons**

---

Osgoode Legal Studies Research Paper Series

Research Papers, Working Papers, Conference  
Papers

---

2014

# Towards a Pedagogy of Diversity in Legal Education

Faisal Bhabha

Osgoode Hall Law School of York University, [fbhabha@osgoode.yorku.ca](mailto:fbhabha@osgoode.yorku.ca)

Follow this and additional works at: <http://digitalcommons.osgoode.yorku.ca/olsrps>

---

## Recommended Citation

Bhabha, Faisal, "Towards a Pedagogy of Diversity in Legal Education" (2014). *Osgoode Legal Studies Research Paper Series*. 1.  
<http://digitalcommons.osgoode.yorku.ca/olsrps/1>

This Article is brought to you for free and open access by the Research Papers, Working Papers, Conference Papers at Osgoode Digital Commons. It has been accepted for inclusion in Osgoode Legal Studies Research Paper Series by an authorized administrator of Osgoode Digital Commons.

# OSGOODE HALL LAW SCHOOL

## LEGAL STUDIES RESEARCH PAPER SERIES

**Research Paper No. 77**

**Vol. 10/ Issue. 17/ (2014)**

### **Towards a Pedagogy of Diversity in Legal Education**

Bhabha, F. (2014). Towards a Pedagogy of Diversity in Legal Education  
*Osgoode Hall Law Journal*, 52(1), forthcoming.

Faisal Bhabha

#### **Editors:**

Editor-in-Chief: Carys J. Craig (Associate Dean of Research & Institutional Relations and Associate Professor, Osgoode Hall Law School, York University, Toronto)

Production Editor: James Singh (Osgoode Hall Law School, York University, Toronto)

This paper can be downloaded free of charge from:

<http://ssrn.com/abstract=2522924>

Further information and a collection of publications from the Osgoode Hall Law School Legal Studies Research Paper Series can be found at:

[http://papers.ssrn.com/sol3/JELJOUR\\_Results.cfm?form\\_name=journalbrowse&journal\\_id=722488](http://papers.ssrn.com/sol3/JELJOUR_Results.cfm?form_name=journalbrowse&journal_id=722488)



## **Towards a Pedagogy of Diversity in Legal Education**

Bhabha, F. (2014). Towards a Pedagogy of Diversity in Legal Education *Osgoode Hall Law Journal*, 52(1), forthcoming.

Faisal Bhabha

### **Abstract:**

There is resounding consensus that diversity in legal education is a priority. Yet, North American law schools continue to be criticized for failing to reflect the diversity of the society that they are training lawyers to serve. With the backdrop of critical scholarship and empirical evidence, this paper is a project of conceptual reorientation. The first part examines the past 20 years of diversity promotion in legal education and concludes that, while several advances have been made, especially in increasing numerical representation of diverse groups in law schools, the promise of meaningful diversity remains unfulfilled. The next part situates the site of reform on the model of professional identity being produced, which the author suggests is out of reach and out of touch for many minority students. In the final part, the author elucidates a program of transforming the norm of lawyering that is taught in law school. Grounded in a normative framework of access to justice and equality, the author argues that experiential/clinical learning practices offer a useful method to achieve a more engaged pedagogical commitment to diversity in legal education.

### **Keywords:**

Legal education, equality, pedagogy, diversity, access to justice

### **Author(s):**

Faisal Bhabha  
Assistant Professor  
Osgoode Hall Law School  
York University, Toronto  
E: [fbhabha@osgoode.yorku.ca](mailto:fbhabha@osgoode.yorku.ca)

# **TOWARDS A PEDAGOGY OF DIVERSITY IN LEGAL EDUCATION**

**Faisal Bhabha\***

There is resounding consensus that diversity in legal education is a priority. Yet, North American law schools continue to be criticized for failing to reflect the diversity of the society that they are training lawyers to serve. With the backdrop of critical scholarship and empirical evidence, this paper is a project of conceptual reorientation. The first part examines the past 20 years of diversity promotion in legal education and concludes that, while several advances have been made, especially in increasing numerical representation of diverse groups in law schools, the promise of meaningful diversity remains unfulfilled. The next part situates the site of reform on the model of professional identity being produced, which the author suggests is out of reach and out of touch for many minority students. In the final part, the author elucidates a program of transforming the norm of lawyering that is taught in law school. Grounded in a normative framework of access to justice and equality, the author argues that experiential/clinical learning practices offer a useful method to achieve a more engaged pedagogical commitment to diversity in legal education.

---

<b>I. WHY DIVERSITY?</b> .....	<b>5</b>
<b>II. DIVERSITY AS EQUALITY</b> .....	<b>10</b>
A. REPRESENTATION .....	13
B. INCLUSION.....	15
<b>III. THE FIRST WAVE OF DIVERSITY IN LEGAL EDUCATION.....</b>	<b>17</b>
A. TARGETED ADMISSIONS: AFFIRMATIVE ACTION IN ACTION.....	18
B. CURRICULUM AND TEACHING REFORM: MAKING OUTSIDERS INSIDERS.....	22
C. DIVERSITY AND ACCESS TO THE PROFESSION .....	26
<b>IV. TOWARDS DIVERSITY PEDAGOGY</b> .....	<b>27</b>
A. BEYOND CELEBRATING DIFFERENCE: MEANINGFUL REPRESENTATION .....	28
B. TEACHING TRANSFORMATION: IMPLEMENTING INCLUSION.....	30
<b>V. THEORY + PRACTICE + REFLECTION.....</b>	<b>31</b>
A. THE DOMINION OF DOCTRINE .....	32
B. LEARNING LAW BY DOING LAW: BROADENING SKILLS .....	33
C. IN FROM THE MARGINS: MAINSTREAMING EXPERIENTIAL EDUCATION .....	35
D. EMPLOYING EXPERIENTIAL EDUCATION TO IMPLEMENT DIVERSITY .....	37
<b>VI. CONCLUSION</b> .....	<b>40</b>

---

\* Assistant Professor, Osgoode Hall Law School of York University. The author thanks Harry Arthurs, Aaron Dhir, Vik Kanwar and Diana Younes for helpful ideas and comments. He is indebted to Andrea Anderson, Sharifa Khan and Danielle Cornacchia for their invaluable research assistance. Any and all errors are the author's alone.

---

Legal education in North America is changing. These changes are occurring at a time when law schools are under intense pressures from a variety of forces, many of which are beyond anyone's control.<sup>1</sup> One important push, both in legal education and in the profession,<sup>2</sup> is to better implement formal diversity commitments. This push for diversity occurs at the nexus of at least three related developments in law schools across North America.<sup>3</sup> First, there is a consensus that diversity is both a social fact and a public good, deserving of efforts to foster and promote it institutionally. Secondly, well-known reform initiatives have aimed to diversify the demographic composition of the law school by admitting students and appointing faculty members from historically under-represented communities. Finally, legal educators are approaching legal education more critically than ever and are embracing innovative teaching practices, most notably experiential education. Although the questions about how to educate and train lawyers are not novel—the core model has persisted despite incessant critique<sup>4</sup>—the call for a more substantial and structural review of the modes of legal education has reached fever pitch.<sup>5</sup>

---

<sup>1</sup> Harry Arthurs, "The Future of Law School: Three Visions and a Prediction" (2013)

[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2349633](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2349633)

[arguing that the "future of law school depends on ... developments in political economy, technology, demography and society that are reconfiguring the legal system, the market for professional services and the structure of higher education."]

<sup>2</sup> For definitional purposes, when speaking of "legal education," I refer to the provision of training and educational services to students who will subsequently be eligible for membership in a bar. This education occurs in faculties housed within institutions of higher learning, known colloquially as "law schools," and is carried out by a high proportion of tenured, full-time law professors, with a smaller number of part-time or adjunct faculty, many of whom maintain active professional lives. When speaking of the "legal profession," I refer to the professionally constituted corps of licensed lawyers in the relevant jurisdiction. Although every jurisdiction has a professional corps of lawyers, there is sufficient variation in the modes of organizing and regulating lawyers—and in the business, cultural, political, and interpersonal relations among lawyers—that my reference here is specific to the legal profession in the province of Ontario, Canada. I suggest that the relevance of one sizable English-speaking, North American jurisdiction (population: 12 million) with a largely urban, middle-class, and multicultural population is a good general reference point from which many analogues may be drawn to jurisdictions with similar demographic features.

<sup>3</sup> I use the province of Ontario in Canada as a case study, but generalize many observations to North American law school experience broadly. Legal education and the legal profession across North American jurisdictions share many similar features and exist amid relatively comparable legal cultures, socio-political conditions, and institutional structures.

<sup>4</sup> See E Benjamin Spencer, "The Law School Critique in Historical Perspective" (2012) 69 Wash & Lee L Rev 1949 (summarizing the history of legal education in the United States, and noting that "when one canvases the various assessments of formal legal education over the past 130 years it is remarkable how consistent the criticisms are and how persistent the Langdellian model has been in the face of these critiques" at 1982). Modern American legal education, developed by Christopher Columbus Langdell, Dean of Harvard Law School beginning in 1870, also became the dominant model in Canada. See Ian Holloway, "Future of Law Conference: The Evolved Context of Legal Education" (2013) 76 Sask L Rev 133 at 134. Holloway argues:

The system of legal education as we know it in Canada today is a creature of the American industrial revolution. It is not, despite what we might instinctively assume, grounded in the

Issues about access to, and delivery of, legal education are related, both causally and contextually, to issues about access to, and delivery of, legal *services*. The interconnection of legal education and the provision of legal services in a profit-driven market has meant that market collapse tethers the future of law schools to economic interests. One effect, evident in recent developments in law school accreditation and lawyer licensing, is that law schools are expected to produce “practice-ready” graduates.<sup>6</sup> Whether this will lead to radical reform in professional norms, or a pandering to established interests, remains to be seen.<sup>7</sup> Much will depend on the values and ambitions identified by legal educators, and the strategies adopted to advance them.<sup>8</sup> For these reasons, legal education is inextricably tied to issues of professional regulation and access to justice, which makes it both timely and

---

antiquity of the common law system. Rather, it stemmed from a move in the aftermath of the US Civil War to make the education of lawyers both more “scientific” and more rigorous. And it endures to this day.

<sup>5</sup> See Alfred Z Reed, *Training for the Public Profession of Law* (New York: The Carnegie Foundation for the Advancement of Teaching, 1921) [Reed Report]; Section of Legal Education and Admissions to the Bar, *Report of the Task Force on Law Schools and the Profession: Narrowing the Gap* (Chicago: American Bar Association, 1992), online:

<[http://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/2013\\_legal\\_education\\_and\\_professional\\_development\\_maccrate\\_report%29.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/2013_legal_education_and_professional_development_maccrate_report%29.authcheckdam.pdf)> [McCrate Report]; William M Sullivan et al, *Educating Lawyers: Preparation for the Profession of Law* (San Francisco: Jossey-Bass for the Carnegie Foundation for the Advancement of Teaching, 2007) [Carnegie Report]; Richard Susskind, *The End of Lawyers? Rethinking the Nature of Legal Services* (Oxford, UK: Oxford University Press, 2008).

<sup>6</sup> This is especially true in the United States where, since the late 2000s, the American Bar Association accreditation committee has moved towards requiring law schools to produce “practice-ready” graduates. See generally Margaret Martin Barry, “Practice Ready: Are We There Yet?” (2012) 32 Boston College J L & Soc Just 247. In Canada, the shift to practice readiness occurs in a different historical and socio-economic context. Critics in both countries doubt whether practice readiness is useful as an accreditation standard. See Robert Condlin, “Practice Ready Graduates’ — A Millennial Fantasy”, online: Social Science Research Network

<[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2316093](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2316093)> [describing law graduates’ job prospects as “a function of a school’s academic reputation, not its curriculum” and arguing that “the legal labor market will rebound only after the market as a whole has rebounded (and perhaps not then).” See also Holloway, *supra* at 137 [arguing that “to define the goals of legal education by reference to what a young lawyer needs to begin private legal practice is short-sighted”, given the changes occurring within the profession and the varied types of legal careers that young lawyers can expect to have over the course of their careers].

<sup>7</sup> See Larry E Ribstein, “Practicing Theory: Legal Education for the Twenty-First Century” (2011) 96 Iowa L Rev 1649; Carrie Hempel & Carroll Seron, “An Innovative Approach to Legal Education and the Founding of the University of California, Irvine School of Law” in Scott L Cummings, ed, *The Paradox of Professionalism: Lawyers and the Possibility of Justice* (Cambridge, UK: Cambridge University Press, 2011).

<sup>8</sup> See Arthurs, “The Future of Law School”, *supra* at X [arguing that the values and ambitions of law schools are beyond the reach of regulators and “...will determine whom they hire as faculty members and admit as students, what and how they teach, the standards they use to measure achievements and the way they allocate their scarce resources. And crucially, it will determine how — if at all — law schools exploit their strategic location as producers and distributors, as conservators and critics, of legal and social knowledge.”

appropriate to consider the implications of specific commitments to diversity within the context of these broader factors.

I proceed, then, with two claims that are descriptive. The first claim, discussed in Parts I and II of this article, is that diversity promotion is a universally recognized normative goal that has been the subject of institutional initiatives within legal education and in the legal profession. Law schools are both influenced and shaped by the values of the professional world of lawyers especially as directed by the self-governing bodies of the profession, as well as by diversity promotion commitments within the academy and in university policy.<sup>9</sup> Yet, while the normative case for diversity has been embraced widely and at all levels, these declarations and promises tend to lack articulation of what diversity means as a substantive concept.<sup>10</sup> In this sense, diversity pedagogy in North American law schools to date can be described as “thin.”

The second descriptive claim, which I outline in Part III, is that the current state of affairs with respect to diversity issues in the law school reveals that institutional initiatives to promote diversity have brought some advancement, but incomplete results. This claim will be developed with reference to a variety of scholarship, including empirical, theoretical and experiential accounts. These indicate, for example, that despite efforts to make legal education and the profession more representative, minorities continue to be statistically under-represented<sup>11</sup> and often recount experiences of marginalization in law school.<sup>12</sup>

Moving from the descriptive to the prescriptive, in Part IV of this article I outline the parameters for a pedagogical program of diversity in legal education. I redefine the

---

<sup>9</sup> See *infra* note 16 and accompanying text.

<sup>10</sup> See *infra* notes 12, 16 and accompanying text.

<sup>11</sup> See Michael Ornstein, *Racialization and Gender of Lawyers in Ontario: A Report for the Law Society of Upper Canada* (Toronto: LSUC, April 2010), online: <[http://www.lsuc.on.ca/media/convapril10\\_ornstein.pdf](http://www.lsuc.on.ca/media/convapril10_ornstein.pdf)>. See also Wendy Cukier et al, *DiverseCity Counts 3: A Snapshot of Diverse Leadership in the GTA* (Toronto: Diversity Institute, Ted Rogers School of Management at Ryerson University, 2011), online: <<http://diversecitytoronto.ca/wp-content/uploads/CountsReport3-full.pdf>>. Cukier et al examine racial representation in positions of leadership within the various institutions of the legal community of the Greater Toronto region. The trends identified in their report are likely representative of many North American cities with similar diversity patterns. In the United States, while 70 per cent of the general population is white, about 90 per cent of lawyers are white. The American legal profession is less racially diverse than most other professions—racial diversity in the legal profession has actually slowed considerably since 1995. See ABA Presidential Initiative Commission on Diversity, *Diversity in the Legal Profession: The Next Steps* (Chicago: American Bar Association, 2011) at 11, online: <[http://www.americanbar.org/content/dam/aba/administrative/diversity/next\\_steps\\_2011.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/diversity/next_steps_2011.authcheckdam.pdf)> [ABA, *Next Steps*].

<sup>12</sup> See Brenna Bandhar, “Always on the Defence: The Myth of Universality and the Persistence of Privilege in Legal Education” (2002) 14:2 CJWL 341; Diana Younes, “Teaching White: Constructing Lawyer Identity in Canadian Law Schools” in RJ Gilmour, ed, *“Too Asian?”: Racism, Privilege, and Post-secondary Education* (Toronto: Between the Lines, 2012).

theoretical and normative underpinnings of a diversity pedagogy described as “thick”, and argue that the confluence of diversity intensification and curriculum reform provides a unique opportunity to implement novel, and more inclusive, approaches to legal education. On this basis, Part V highlights how the embrace of experiential education, with its blended use of hands-on experience and structured critical reflection, can help law schools deliver on their commitment to diversity in substantive ways that both produce competent lawyers and reduce barriers in education and the profession.

## I. WHY DIVERSITY?

There is wide agreement that diversity in North American legal education is a priority.<sup>13</sup> The reasons for why the promotion of diversity is desirable vary. The Canadian Bar Association spearheaded research and policy work on sex and racial equality, publishing two key reports in 1993 and 1999 calling for greater attention to diversity in the Canadian legal profession.<sup>14</sup> A survey of Canadian law society websites reveals that all of the provincial and territorial regulatory bodies have adopted some form of diversity policy, linking the core values of the legal profession with the practical goals of increasing representation, equality, and access in legal practice and services.<sup>15</sup> For example, the Law Society of Upper Canada (LSUC), which regulates the

---

<sup>13</sup> See *supra* note 2.

<sup>14</sup> Task Force on Gender Equality in the Legal Profession, *Touchstones for Change: Equality, Diversity and Accountability* (Ottawa: CBA, 1993) (Chair: The Hon Bertha Wilson), online: <<http://www.cba.org/CBA/equity/pdf/touchstonesforchange.pdf>> [CBA, *Touchstones*]; Working Group on Racial Equality in the Legal Profession, *Racial Equality in the Legal Profession* (Ottawa: CBA, 1999) (Co-Chairs: Joanne St Louis & Benjamin Trevino, QC), online: <<http://www.cba.org/cba/pubs/pdf/racialequality.pdf>>.

<sup>15</sup> Survey conducted by the author (May 2013) [on file with author]. See e.g. Law Society of British Columbia, *Equity and Diversity*, online: <<http://www.lawsociety.bc.ca/page.cfm?cid=5&t=Equity-and-Diversity>>; Law Society of British Columbia, *Code of Professional Conduct for British Columbia* (2013) ch 2, ch 6.3; *The Rules of the Law Society of Alberta* (5 June 2013) at 1-15; Law Society of Alberta, *Strategic Plan 2010-2013* (November 2010) at 3-4, 8; Law Society of Saskatchewan, *Equity Office*, online: <<http://www.lawsociety.sk.ca/for-lawyers-and-students/equity-office.aspx>>; Law Society of Saskatchewan, *Code of Professional Conduct* (2012) at 103; Law Society of Manitoba, *About Equity*, online: <<http://www.lawsociety.mb.ca/equity/about-equity>>; Law Society of Manitoba, *Code of Professional Conduct* (2011), rr 5.03(4)-(5); Law Society of Upper Canada, *Equity and Diversity in the Legal Profession*, online: <<http://www.lsuc.on.ca/with.aspx?id=2147487011>>; Law Society of Upper Canada, *Rules of Professional Conduct* (Toronto: LSUC, 2000), rr 1.03(1)(b), 5.04; Law Society of New Brunswick, *Code of Professional Conduct* (2009) at 93; Law Society of New Brunswick, *Objects and Duties* at b, online: <<http://www.lawsociety-barreau.nb.ca/emain.asp?98>>; Nova Scotia Barristers' Society, *The Equity Program*, online: <[http://www.nsbs.org/improving\\_justice/the\\_equity\\_program](http://www.nsbs.org/improving_justice/the_equity_program)>; *Legal Profession Act*, SNS 2004, c 28, s 4(2)(d)(i); Nova Scotia Barristers' Society, *Code of Professional Conduct* (2012) at 89; Nova Scotia Barristers' Society, *Annual Report 2012*; Canadian Bar Association, *Code of Professional Conduct* (Ottawa: CBA, 1988) at ch XX, no 6, online: Law Society of Prince Edward Island <[http://www.lspei.pe.ca/pdf/code\\_of\\_professional\\_conduct\\_CBA1987.pdf](http://www.lspei.pe.ca/pdf/code_of_professional_conduct_CBA1987.pdf)>; Law Society of Newfoundland and Labrador, *Code of Professional Conduct* (1 January 2013) at 91, 101; Law Society of Yukon, *Toward a New Legal Profession Act: Policy Paper* (18 November 2011) at 4; Law Society of the Northwest Territories, *Policy Manual* (1980) at 16; *Arctic Obiter* (LSNWT, 2012) 16:1; Law Society of



practice of law in the province Ontario, maintains a rich array of programs and initiatives designed to promote “equity and diversity.” This includes designating a Discrimination and Harassment Counsel; a membership-based Equity Advisory Committee attached to a committee of benchers (elected governors). In 2012, the LSUC created the “Challenges Faced by Racialized Licensees Working Group”, with a mandate to investigate obstacles to minorities in the profession and consider strategies for enhanced inclusion at all career stages.<sup>16</sup> The LSUC also maintains a Disability Resource Centre, Career Coaching for Women Lawyers, a Retention of Women in Private Practice working group, and a Human Rights Monitoring Group. The American Bar Association’s Report, *Next Steps*, suggests that a similar embrace of diversity and equity has occurred across the American legal profession.<sup>17</sup>

In addition to the institutional and professional recognition of the diversity priority, law faculties have also noted the diversity gaps in legal education, and clear steps were taken to redress historical exclusion.<sup>18</sup> A survey of seventeen Canadian law faculty websites finds that diversity is explicitly mentioned in the governing policies of eleven schools.<sup>19</sup> Of the faculties that do not have an explicit diversity policy, the goals

---

Nunavut, *Legal Ethics and Practice Committee*, online: <<http://lawsociety.nu.ca/legal-ethics-and-practice-committee/>>.

<sup>16</sup> LSUC Equity and Aboriginal Issues Committee, *Report to Convocation* (October 25, 2012). Online: <http://www.lsuc.on.ca/WorkArea/DownloadAsset.aspx?id=2147489870>

<sup>17</sup> ABA, *Next Steps*, *supra* note 8.

<sup>18</sup> See Kevin R Johnson, “The Importance of Student and Faculty Diversity in Law Schools: One Dean’s Perspective” (2011) 96 Iowa L Rev 1546 (outlining the arguments, from a Dean’s perspective, for improving diversity of both the student body and faculty in legal education).

<sup>19</sup> There are seventeen Canadian law faculties outside of Quebec. I did not include the five Quebec law schools in this study. Survey conducted by the author (May 2013) [on file with author]. For direct references to diversity, see *e.g.* UBC Faculty of Law, *Equity at UBC Law* (“The Faculty celebrates, supports and promotes the importance of diversity, equity and a respectful community to a vibrant law school.” at 1); *University of Victoria Faculty of Law Equity Policy* (2008) (“Diversity, equity, fairness and respect are paramount values at the Faculty of Law and central to this policy.” at 2); Philip Bryden, “Dean’s Welcome,” *University of Alberta Faculty of Law*, online:

<<http://lawschool.ualberta.ca/about/dean.aspx>> (“We have a diverse ... student body”); University of Manitoba, “Support” *Robson Hall, Faculty of Law*, online: <<http://law.robsonhall.ca/support>> (“Robson Hall promotes diversity.”); University of Toronto Faculty of Law, *Admissions Policies*, online: <<http://www.law.utoronto.ca/admissions/jd-admissions/admissions-policies>> (“The Faculty seeks a diverse ... student body.”); Queen’s University Faculty of Law, *Admission Information*, online: <<http://law.queensu.ca/prospectiveStudents/admissionInformation.html>> (declaring that the “diversity of the Canadian population should be reflected in the ranks of those granted access to legal education.”); Osgoode Hall Law School, *Our Holistic Review Process*, online: <<http://www.osgoode.yorku.ca/prospective-students/jd-program/applying/review-process>> (incorporating “both academic excellence and social diversity”); Western Law, *First-Year Admissions*, online: <[https://www.law.uwo.ca/admissions/first\\_year\\_admissions.html](https://www.law.uwo.ca/admissions/first_year_admissions.html)> (“The Faculty of Law is strongly committed to excellence and diversity.”); Windsor Law, *Our Admissions Criteria*, online: <<http://www1.uwindsor.ca/law/our-admissions-criteria-0>> (seeking members of “Canada’s diverse and varied society”); McGill Faculty of Law, Event, “‘Law school and diversity’: Admission information session for students of colour and students from marginalized backgrounds” (12 October 2012), online: <<http://www.mcgill.ca/law/channels/event/law-school-and-diversity-admission-information-session-students-colour-and-students-m>>; University of New Brunswick Faculty of Law, *Law Admissions*

of diversity are reflected in institutional practices. For example, targeted equitable admissions policies, especially for Aboriginal applicants, as well as “equity” policies for increasing the participation of “racial and cultural minorities, lesbians, gay men and bisexuals, persons with disabilities, and economically disadvantaged persons,”<sup>20</sup> ascribe value to the experiences of “difference” carried by members of marginalized groups and minorities. Through policies and practices rooted in equality commitments, law schools across North America have universally pledged to make the promotion of diversity in legal education a priority.<sup>21</sup>

The rationale for embracing diversity has not always been articulated in terms of equality. The most common rationales for diversity come from three distinct approaches. First, the professional impetus is driven by individual, group, corporate, and institutional forces within the legal profession.<sup>22</sup> This push notes the increasing expectation of clients for their lawyers and law firms to demonstrate diversity competence. This arises as a result of factors of globalization, particularly transnational trade and migration. Lawyers with cultural and linguistic proficiencies, and firms with diverse staff, are better able to meet diverse client needs.<sup>23</sup> This push also recognizes the fact that lawyers are leaders in many fields and have a broad mandate to promote the interests of justice. The profession takes seriously its

---

*Handbook 2014* at 4, 5, 6, 16-17. See also University of Ottawa, Common Law Section, *Education Equity Office*, online: <<http://www.commonlaw.uottawa.ca/en/admissions/education-equity/education-equity-office.html>>; Schulich School of Law at Dalhousie University, *Indigenous Blacks & Mi'kmaq Initiative*, online: <<http://www.dal.ca/faculty/law/about/indigenous-blacks-mi-kmaq-initiative.html>>; Lee Stuesser, “Dean’s Message” *Lakehead University Faculty of Law*, online: <<https://www.lakeheadu.ca/academics/departments/law/deans-message>>; Université de Moncton, *Objectifs*, online: <<http://www.umoncton.ca/umcm-droit/node/3>>; University of Calgary Faculty of Law, *Aboriginal Applications*, online: <<http://law.ucalgary.ca/prospectivestudents/admission/aboriginalapplicants>>; University of Saskatchewan College of Law, *Special Applicants*, online: <<http://law.usask.ca/programs/law-degree/special-applicants.php>>; Thompson Rivers University Faculty of Law, *Academic Accommodation Policy*.

<sup>20</sup> University of Ottawa, *Education Equity Office*, online:

<<http://www.commonlaw.uottawa.ca/en/admissions/education-equity/education-equity-office.html>>.

<sup>21</sup> Of the seventeen Canadian law school websites surveyed, eleven explicitly reference “diversity” as an institutional priority; the remaining six faculties have policies and priorities that do not contain the word diversity, but instead emphasize “equity” or “access.” See e.g. Lorne Sossin, *Diversity & Inclusion* (29 May 2013), online: Osgoode Hall Law School <<http://www.osgoode.yorku.ca/about/diversity-inclusion>> (summarizing statistics that show the latest incoming class of JD students is “the most diverse in Osgoode’s history” and linking this data to the school’s goals of “accessibility and inclusion”); University of British Columbia Faculty of Law, *Equity at UBC Law*, online: <[http://www.law.ubc.ca/files/pdf/current/Equity\\_Statement.pdf](http://www.law.ubc.ca/files/pdf/current/Equity_Statement.pdf)> (“The Faculty celebrates, supports and promotes the importance of diversity [and] equity” at 1); University of Toronto Faculty of Law, *Public Interest and Diversity*, online: <<http://www.law.utoronto.ca/focus-area/public-interest-and-diversity>> (noting the “school’s ... commitment to diversity”).

<sup>22</sup> See, e.g., *A Statement of Support for Diversity and Inclusion by General Counsel in Canada* (June 2011), online: <http://www.ryerson.ca/about/generalcounsel/pdfs/LLD%20PosterJune%202011.pdf>.

<sup>23</sup> See ABA, *Next Steps*, *supra* note 8.

monopoly over the provision of legal services, and recognizes that this privilege comes with concomitant duties. The profession claims to hold its members to a high standard of professional responsibility and integrity. This requires lawyers to be attentive to shifting social and demographic forces that are bound to impact their professional lives as well as the provision of legal services to the public.

Secondly, a political imperative recognizes that diversity is a priority in public policy, modelled within the public service sector, and is promoted in the broader society through a host of initiatives designed to enhance communications and interactions across differences. Lawyers bear considerable responsibility for sustaining a democratic, rule-of-law legal order that represents the society it serves. For much of the general public, lawyers are both the guardians and the gatekeepers of the legal system, instrumental in the vindication of citizens' legal rights and entitlements. As leaders in both politics and society, members of the legal profession should ensure broad and representative access to the profession as a gateway to positions of influence in politics and society.<sup>24</sup>

Finally, the growing importance of ethics regulation has led to linking the diversity imperative with legal professionalism and access to justice. Emerging scholarship on Canadian legal ethics has highlighted the importance of diversity to the legitimacy of the legal profession and the administration of justice.<sup>25</sup> This view holds that a legal profession that is not appropriately representative of the society in which it operates will be hindered in carrying out its core mandate, and will lose the confidence of the public it is invested with the duty to serve. The ethics push has also been linked to more substantive notions of justice, and the suggestion that lawyers have a professional duty to promote justice and equality.<sup>26</sup> While such language is articulated in formal policy, there is little elaboration or enforcement.

Indeed, constitutional and legislative developments in recent decades have more clearly focussed on the public role of lawyers in remedying historical disadvantage and promoting equality as a social goal.<sup>27</sup> In turn, this has produced a normative imperative to promote diversity in the legal profession and, by necessity, in legal education. In Ontario, the *Rules of Professional Conduct* ("*Rules*") provide that the *Rules* shall be interpreted in a way that reflects lawyers' "special responsibility to recognize

---

<sup>24</sup> See Cukier et al, *supra* note 8 at 34-35 (concluding that "the generally low rates of visible minority representation among legal sector leaders suggest that the legal profession and its institutions need to continue to promote the advancement of visible minorities in leadership roles.")

<sup>25</sup> See Adam M Dodek, "Canadian Legal Ethics: Ready for the Twenty-First Century at Last" (2009) 10:7 German LJ 1047.

<sup>26</sup> See David M Tanovich "Law's Ambition and the Reconstruction of Role Morality in Canada" (2005) 28:2 Dalhousie LJ 267 [arguing for a professional code of conduct that incorporates moral concepts of justice and equality, and presumably including diversity].

<sup>27</sup> In Canada, these developments include the adoption of statutory human rights, the *Canadian Bill of Rights*, and, in 1982, the incorporation into the constitution of the *Canadian Charter of Rights and Freedoms*. See Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (UK), 1982, c 11 [*Charter*].

the diversity of the Ontario community, to protect the dignity of individuals, and to respect human rights laws in force in Ontario.”<sup>28</sup> This includes a “special responsibility to respect the requirements of human rights laws in force in Ontario and, specifically, to honour the obligation not to discriminate” on the grounds listed in the *Human Rights Code* (“Code”)<sup>29</sup> Ontario is the only jurisdiction that makes this human rights responsibility an explicit rule of practice. Five other provincial codes of conduct include—in commentary—reference to a “special responsibility” to either “comply with”, “respect” or “honour” the obligations in human rights law,<sup>30</sup> while the three territories and two more provinces include simply a “responsibility” to do so.<sup>31</sup> Only the professional codes of Quebec and New Brunswick make no mention of human rights law.<sup>32</sup>

Tethering the lawyer’s duty to promote equality to the individual right to non-discrimination serves to limit the aspiration of an equality promotion ethic. It also raises the obvious question, why include the rule at all if it requires nothing more than what statutory human rights already require of lawyers? In the absence of articulated applications, whether as rules or standards, it is difficult to see how a broader equality goal is to become manifest. More likely is that the existing professional culture reproduces itself—a professionalism absorbed in privilege and driven by profit. Whether legal educators can (and should) seek, through progressive destabilizing pedagogy, to effect systemic change, economic justice or the remediation of hierarchy, remains unclear. It is no wonder, then, that in the absence of a coherent theory of equality to define the diversity goal, it ends up appearing either thin or coopted by vested interests.

Despite the prevalence of factors beyond the control of legal educators, if the goal is to promote diversity in the legal profession, there is good reason to focus efforts on the law school. This is so for a number of reasons. The law school it is the first point of admission to the legal community. It is the site of immersion and instruction in legal reasoning, and the gateway to the profession. It is where one assimilates legal theory and doctrine, acquires aptitude, learns and engages in the production of legal knowledge, develops an idea about what a lawyer is, identifies professional options, and pursues job opportunities or prepares for solo practice. In fact, a great deal happens in law school that is both reflective of the world in which lawyers work, and determinative of how that world will look in the future. The first women and minority law professors wrote of their experiences of alienation in the classroom, on faculty

---

<sup>28</sup> See The Law Society of Upper Canada, *Rules of Professional Conduct*, Toronto: LSUC, 2000 [LSUC, *Rules*], at Rule 1.03(b).

<sup>29</sup> *Ibid* at Rule 5.04.

<sup>30</sup> These are: British Columbia, Alberta, Saskatchewan, Manitoba and Newfoundland & Labrador. Online review of all provincial and territorial law society Rules, conducted by the author.

<sup>31</sup> These are: Nunavut, Northwest Territories, Yukon, Prince Edward Island and Nova Scotia.

<sup>32</sup> These are also the only two provinces in which the civil law and common law co-exist.

councils and in the law books.<sup>33</sup> They demonstrated the differentiated ways that law and legal education impact individuals and groups in ways that speak more deeply to underlying systemic inequality than do formal anti-discrimination laws. Their subjective experiences with legal education and initiation into the profession exposed realities that created an imperative for reform. For at least the past thirty years, North American law faculties have articulated a commitment to making law schools more representative of the society they serve; but their efforts have failed to extinguish the diversity deficit, and student accounts of alienation in the classroom and in student life suggest that the work of diversity is far from complete. As I have suggested, a significant contributor to the problem of strategizing the promotion of diversity and evaluating success is that the concept itself has not been adequately defined. And, more importantly, the implications of how diversity is defined have not been seriously considered.

## II. DIVERSITY AS EQUALITY

As a descriptive concept, diversity is a statement of demographic data. Framed most broadly, it refers to the wide range of individuals and groups that constitute a society. It may refer to all sorts of grounds of difference, including not only the types of grounds protected by anti-discrimination legislation, but *any* basis of difference. The potential for definitional indeterminacy has led to some concern about a concept of diversity devoid of substance.<sup>34</sup> For some, “diversity” can be understood simply as a synonym for “variety.”<sup>35</sup> But what is the value of celebrating difference for its own sake? No doubt, there may be aesthetic or other reasons to value difference, but this is not how diversity is conceptualized in public discourse, at least with respect to the legal profession. Rather, the diversity imperative emerged as a purposeful response to institutionalized historical exclusion.

A positive diversity program would strip back layers of historical understandings of the law and lawyering in order to access the foundations of exclusion. This normative transformation, if undertaken in legal education, would have necessary implications. It demands a critical assessment of what it means to “think like a lawyer” because it challenges the inherited professional model and, necessarily, the skills and traits that characterize the “good” lawyer.<sup>36</sup> Recognizing that lawyers have a privilege that

---

<sup>33</sup> See Kimberle Williams Crenshaw, “Toward a Race-Conscious Pedagogy in Legal Education” (1988-1990) 11 Nat’l Black LJ 1 [Crenshaw, “Race-Conscious Pedagogy”]; Patricia Williams, *The Alchemy of Race and Rights*; Mari J Matsuda, “Affirmative Action and Legal Knowledge: Planting Seeds in Plowed-Up Ground” (1988) 11 Harv Women’s LJ 1 See also Tina Grillo, “Tenure and Minority Women Law Professors: Separating the Strands” (1996-1997) 31 USFL Rev 747 (noting the patterns of exclusion within law school faculty composition).

<sup>34</sup> Sheila Foster, “Difference and Equality: A Critical Assessment of the Concept of Diversity” (1993) Wis L Rev 105 at 133

<sup>35</sup> *Ibid* at 126.

<sup>36</sup> See Tanovich, “Law’s Ambition,” *supra* note 21; Trevor CW Farrow, “The Good, the Right, and the Lawyer” (Osgoode Hall Law School Comparative Research in Law & Political Economy Research Paper No 8/2013), online: <<http://ssrn.com/abstract=2175137>>; David Luban, *Lawyers and Justice: An*

requires embedding responsibility is one reason why legal regulators enforce rules of professional conduct. However, embedding the culture of professional responsibility begins not with admittance to the bar and regulation, but with education. Law teachers are in a primary position to initiate students into legal culture, identity, analysis, and action well before the regulator takes on the role of governing professional responsibility. The question remains whether legal educators will challenge and reform inherited approaches to legal professionalism, or simply replicate them. A diversity pedagogy necessarily requires the former if it is to meaningfully deliver on the stated normative commitments.

The key challenge with teaching law from a diversity-equality perspective is presented by many of the premises on which legal reasoning is based. Principal among these is the posture of neutrality or objectivity in law. Writing as a black woman teaching in an American law faculty in the 1990s, Kimberlé Crenshaw identified a governing myth in traditional legal education: “perspectivelessness”,<sup>37</sup> which is described as a myopic posture that obscures or ignores patterns of inequality and the complicity of the law, legal institutions, and the legal academy in perpetuating structural racial inequality.<sup>38</sup> The harm of perspectivelessness is that it speaks a “truth” about law’s neutrality that is plainly untrue for members of disadvantaged communities. The ways in which perspectivelessness masks law’s complicity in reproducing racial exclusion are muted by the law’s embrace of formal equality.<sup>39</sup> Indeed, the very idea of a perspectiveless, “neutral” law is born of the concept of formal equality. Colourblindness is a classic example of a formal equality mindset.<sup>40</sup> Under such models, equal treatment is ensured through “objective” decision-making and by treating everybody the same.

Formal equality accepts the moral view that all persons are, at least theoretically, equally capable of realizing or fulfilling any goal reasonably available to any other person. However, it fails to appreciate historical factors that frustrate the possibility of actual equality of opportunity. Formal equality fails to account for the underlying conditions that create exclusion in the first place. It is not useful to teach law from an

---

*Ethical Study* (Princeton, NJ: Princeton University Press, 1988) (arguing that, for all intents and purposes, lawyers are “the law” for the vast majority of the public and for this reason, being a good lawyer and an ethical lawyer is important for the entire justice system).

<sup>37</sup> *Supra* note 24. See also Brenna Bhandar, “Always on the Defence: The Myth of Universality and the Persistence of Privilege in Legal Education” (2002) 14:2 CJWL 341.

<sup>38</sup> There is a sufficient body of work now to accept as sound and persuasive the notion of a broadly shared experience of racial antagonism and exclusion stemming from the conventional ways in which the law is created, reproduced, interpreted, applied, and taught. See *e.g.* .

<sup>39</sup> The concept of substantive equality is favoured by many, who take a broader view of the original causes and enabling constructs that lead to the persistence of systemic discrimination. Formal equality remains a dominant, and even resurgent, model of conceiving of equality. See Mario L Barnes, Erwin Chemerinsky & Trina Jones, “A Post-Race Equal Protection?” (2010) 98 Geo LJ 967 (warning against the perils of a “post-race” or race-neutral analysis of American legal history or contemporary realities, given statistical evidence showing parallels between race and social and economic disadvantage).

<sup>40</sup> Judith G Greenberg, “Erasing Race from Legal Education” (1994) 28 U Mich JL Ref 51.

internal, false neutral, perspective. Rather, legal educators are increasingly realizing that effective legal education must be self-revealing about the different narratives supporting law's meaning and impact. The embrace of legal pluralism as a tool for understanding overlapping and sometimes conflicting normative systems helps confront the pressures of diversity. Pluralist understanding of law seeks to achieve

detachment from legal centralism revolving around state law, criticism of the exclusiveness of state law, decentralization of court-centered judicial studies, exploration of nonstate legal orders, unveiling of informal socio-legal practices, and an understanding of law as a multi-centered field that deals with the convergence of norms, localities, states, global sites, and practices.<sup>41</sup>

Because society is increasingly differentiated and the application of universal norms is practically fraught, social fact pluralism describes the realities of the multicultural, globalizing societies in which North American law schools are operating.<sup>42</sup> However, normative pluralism "will [not] on its own provide ... direct guidance on normative questions."<sup>43</sup> For this reason, if diversity is a manifestation of social fact pluralism, it still requires a normative corollary. This article asserts that, within the diversity pedagogy model, substantive equality is the value that provides the normative content.

Equality as a diversity norm in legal education must do two things. First, it must embrace normative pluralism. That is, it must accept that no one perspective or system of positive law has dominion over "truth." And, for this reason, the second thing equality as a diversity norm must do is to reject the idea of "perspectivelessness" as a normative frame or default position in legal instruction. False notions of "neutral" or disinvested legal analysis rest on an internalized, constructed, and self-referential concept of "objectivity" that distorts reality by employing established perspectives to the exclusion of others. The privileging of tradition occurs by holding to the idea that legal analysis can be taught as a fixed, objective "science" without directly engaging with changes or conflicts of individual values, experiences, and world views. Thus, subverting the notion of objectivity or neutrality in legal analysis is a necessary precondition to promoting diversity equality in education and creating space for the law to embody the full panoply of human experience.

Speaking about diversity in terms of inclusion and exclusion helps emphasize important historical connections between power, privilege, and professionalism. It also acknowledges gendered and racialized patterns of exclusion. When viewed in this

---

<sup>41</sup> Gad Barzilai, "Beyond Relativism: Where Is Political Power in Legal Pluralism?" (2008) 9 *Theor Inq L* 395 at 396.

<sup>42</sup> See William Twining, "Normative and Legal Pluralism: A Global Perspective" (2010) 20 *Duke J Comp & Int'l L* 473.

<sup>43</sup> *Ibid* at 517.

full light, the distinction between grounds of difference (what I call the “variety” approach) and patterns of exclusion (the “diversity” approach) becomes critically important. The promotion of diversity, without a willingness to investigate and expose the sources of exclusion and to commit to change, would be meaningless and even counter-productive, given the social fact of inequality. Thus, a variety approach which pursues the goal of representation only goes part way. Diversity from an equality frame of reference moves beyond representation and pursues the more meaningful goal of inclusion. In Part II(A-B), I outline how the dual components of representation and inclusion are integral to a substantively meaningful concept of diversity.

## **A. Representation**

Although there is no universal definition of diversity, it is widely accepted that the legal profession should be representative of the significant personal and group differences that constitute the broader society. This norm of “representation” looks to the social makeup of a particular jurisdiction and asks whether there is a rough correlation between the demographic makeup of society and that of the constituent members of the legal profession. So, for example, if Indigenous peoples constitute 2 per cent of Ontario’s population but only 1 per cent of lawyers in that province,<sup>44</sup> then we have a representation deficit of Indigenous lawyers in Ontario. The reason why a representation gap is viewed as a problem is because the foundational arrangements of liberal democracy provide assurances, at minimum, that all citizens have equal access to the same opportunities as everyone else. Equal opportunity is the baseline of the representation rationale. A representation gap is evidence that this basic assurance of equality is malfunctioning.<sup>45</sup> Within this logic, the onus rests with the legal academy and profession, if they fail to draw broadly from different sectors of the society, to remedy the sources of exclusion and mitigate their effects.

The equality interest in promoting diversity has gained relevance as a result of demographic changes in recent decades that have radically altered the North American population. In Ontario for example, by the mid-2000s, “visible minorities”<sup>46</sup> constituted more than 20 per cent of the population, and growing; in the city of Toronto, they were nearly half the population.<sup>47</sup> In a report prepared for the LSUC,

---

<sup>44</sup> These figures are current to 2006. See Ornstein, *supra* note 8.

<sup>45</sup> It is beyond the scope of this article to trace, empirically, the sources of under-representation. However, law schools committed to promoting diversity can be said, even on a crude reading of the evidence, to inherit and reproduce exclusion patterns of race and class privileging, despite promises of inclusion.

<sup>46</sup> Statistics Canada adopts the Employment Equity definition of “visible minority”, as “persons, other than Aboriginal peoples, who are non-Caucasian in race or non-white in colour.” The following groups are listed as primary examples of visible minority communities in Canada: “Chinese, South Asian, Black, Arab, West Asian, Filipino, Southeast Asian, Latin American, Japanese and Korean.” See

<sup>47</sup> According to the 2006 Canadian Census, Ontario, a province of roughly 12 million residents had a population of 2.7 million “visible minorities”, constituting 22.5% of the population. In Toronto, a city of 5 million, visible minorities numbered 2.1 million, or 42% of the city’s population. See:



Michael Ornstein reports that between 2001 and 2006, the proportion of non-white lawyers rose from 9 per cent to 11.5 per cent—well below their demographic in Ontario.<sup>48</sup> Among younger lawyers (aged 25-34), the proportion of non-white lawyers (20 per cent) in 2006 was on a par with their provincial population figure.<sup>49</sup> On the whole, the legal profession appears to be on track to be statistically representative in the near future. Nonetheless, there remain significant representation gaps when the data are examined more closely. For example, Ornstein found that when looking at minority groups in Ontario, there were ratios of around 1 lawyer in 650 or 750 for members of the Black, South Asian, and Chinese communities.<sup>50</sup> In contrast, he found “just one Filipino lawyer for every 2,730 members of that community, one for every 1,649 Latin Americans and one for every 994 Southeast Asians.”<sup>51</sup> Apparently, as old representation deficits are narrowed, new ones form and widen.

It is worth observing that the legal profession has always had a representation deficit.<sup>52</sup> Explicit exclusionary norms have operated for generations. Such norms became untenable given rapid demographic changes and the realities of globalization and large-scale transnational migration. These and other factors motivated social changes and new legal norms beginning in the 1960s,<sup>53</sup> as part of the global “rights revolution.”<sup>54</sup> In Canada, the 1960s saw first attempts at incorporating a national rights instrument, the *Canadian Bill of Rights*,<sup>55</sup> as well provincial civil rights statutes.<sup>56</sup> The adoption of the *Canadian Charter of Rights and Freedoms*<sup>57</sup> in 1982 created a clear constitutional mandate to promote a vision of the country based on the goal of social inclusion. This was reflected in the *Charter*’s commitment to “preserving the multicultural heritage of Canadians”<sup>58</sup> and its entrenchment of an individual right

---

<http://www.statcan.gc.ca/concepts/definitions/minority-minorite1-eng.htm>  
<http://www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/demo53c-eng.htm>

<sup>48</sup> Ornstein, *supra* note 8 at i.

<sup>49</sup> *Ibid.*

<sup>50</sup> *Ibid* at i-ii.

<sup>51</sup> *Ibid.*

<sup>52</sup> Constance Backhouse, “Gender and Race in the Construction of ‘Legal Professionalism’: Historical Perspectives (Paper delivered at the First Colloquium on the Legal Profession, October 2003), online: <[http://www.lsuc.on.ca/media/constance\\_backhouse\\_gender\\_and\\_race.pdf](http://www.lsuc.on.ca/media/constance_backhouse_gender_and_race.pdf)>; Fiona Kay, “Crossroads to Innovation and Diversity: The Careers of Women Lawyers in Quebec” (2002) 47 McGill LJ 699.

<sup>53</sup> The American civil rights movement of the 1960s dovetailed with the global movement to give life to universal human rights, as reflected in the *Universal Declaration of Human Rights*, GA Res 217(III), UNGAOR, 3d Sess, Supp No 13, UN Doc A/810, (1948) 71.

<sup>54</sup> See Charles Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (Chicago: University of Chicago Press, 1998) (examining the growth of civil rights and human rights across the world, and noting a democratization of access to the courts through social activism).

<sup>55</sup> SC 1960, c 44.

<sup>56</sup> See e.g. *Human Rights Code*, RSO 1990, c H.19 (first enacted in June 1962). See also *Human Rights: The Next Generation* (Annual Report of the Ontario Human Rights Commission, 2011-2012), online: <<http://www.ohrc.on.ca/sites/default/files/2011-2012.pdf>>.

<sup>57</sup> *Supra* note 22.

<sup>58</sup> *Ibid*, s 27. See also Joseph Eliot Magnet, “Multiculturalism and Collective Rights” (2005) 27 Sup Ct L Rev 431 at 441.

to equality, paired with a shield for government-initiated affirmative action for disadvantaged groups.<sup>59</sup>

The Supreme Court of Canada's first judgment interpreting section 15 equality involved a claim by a white South African corporate lawyer seeking access to the profession in British Columbia.<sup>60</sup> In rejecting the citizenship requirement for admission to the bar, the Court affirmed that principles of equality would govern the legal profession. Describing the public importance of lawyers and the power wielded though the licence to practice, Justice McIntyre stated:

While it may be arguable whether the lawyer exercises a judicial, *quasi-judicial*, or governmental role, it is clear that at his own discretion he can invoke the full force and authority of the State in procuring and enforcing judgments or other remedial measures which may be obtained. It is equally true that in defending an action he has the burden of protecting his client from the imposition of such state authority and power. By any standard, these powers and duties are vital to the maintenance of order in our society and the due administration of the law in the interest of the whole community.<sup>61</sup>

Understanding the role of the lawyer as essential to the administration of justice in the public interest in the era of the *Charter* makes the diversity imperative more than a matter of lawyer regulation and professional competence. It is now a function of constitutional commitments to equality.

## **B. Inclusion**

Closing the representation gap is just one component of promoting a conception of diversity that is grounded in equality. This is because demographics alone are not what generated the history of exclusion. In Canada, for example, the history of exclusion has been traced to an elitist conception of the legal profession.<sup>62</sup> A hundred years ago it was widely accepted that lawyers should be white, male, Protestant, and English.<sup>63</sup> The concept of legal professionalism, modelled on the English "gentleman," was the standard used to define the behaviours and habits of a good lawyer. In its effect, this standard operated to exclude non-English, non-elites, and women from the legal profession.

---

<sup>59</sup> *Charter*, *supra* note 22, ss 15(1) and (2).

<sup>60</sup> *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143.

<sup>61</sup> *Ibid* at 188.

<sup>62</sup> Annie Rochette & Wesley Pue, "Back to Basics: University Legal Education and 21st Century Professionalism" (2001) 20 Windsor YB Access Just 167. See also Backhouse, *supra* note 41.

<sup>63</sup> *Ibid*.

With time, the profession evolved, barriers lowered, and diversity inroads gradually brought colour and gender representation to the profession.<sup>64</sup> Evolving public attitudes about equality and discrimination helped to lower barriers and had a narrowing effect on the representation gap, as more women and minorities gained access to the profession.<sup>65</sup> However, rapidly changing demographics would have an even stronger widening effect on the representation gap. In other words, as elitist, racist and sexist ideas that had perpetuated exclusion receded, thereby generating openness to increasing racial and gender representation in the profession, the demographic diversification of the general population far outpaced the entry of minorities into law school and the profession.<sup>66</sup> The problem of exclusion, then—historically linked to systemic and institutional bigotry and prejudice—was heightened by rapid demographic changes. What measures were adopted to remedy historical exclusion were not sufficient to keep up with the pace of social diversification.<sup>67</sup>

A flurry of critical race and feminist scholarship beginning in the 1980s illustrated the link between exclusion and inequality,<sup>68</sup> highlighting the experiences of women and people of colour in legal education.<sup>69</sup> According to these critics, exclusionary historical forces did not evaporate, notwithstanding the narrowing representation gap brought about by diversity-inspired admissions policies.<sup>70</sup> For the critics, historical exclusionary practices are embedded in the content, modes, and forms of contemporary legal education. Although student and faculty composition have

---

<sup>64</sup> Compared to other professions, the legal profession has been notably slow at diversifying and remains significantly outpaced by virtually every other regulated profession in that respect. See Ornstein, *supra* note 8.

<sup>65</sup> *Ibid* at 6-7, 18-20.

<sup>66</sup> *Ibid* at 8 (noting that, as of 2006, “1.5 percent of Ontario lawyers were members of a visible minority group, compared to ... 23.0 percent of the Ontario population”).

<sup>67</sup> See *ibid*. Some of the patterns of unequal access to legal education and the legal profession are evident in Ornstein’s findings. Some minority communities are comparatively well represented while others are woefully under-represented. For example, he found that lawyer-community member ratios were 1:750, 1:627, and 1:755 among the black, South Asian, and Chinese communities, respectively (*ibid* at 9). However, among Filipinos, Latin Americans, and Southeast Asians, the lawyer-community member ratios were 1:2,730, 1:1,649 and 1:994, respectively (*ibid*).

<sup>68</sup> Critical scholarship emerged out of the law and society movement of the late 1960s. Critical race and feminist scholarship blossomed in the 1980s. For a survey of the origins of the law and society movement, see Bryant Garth and Joyce Sterling, “From Legal Realism to Law and Society: Reshaping Law for the Last Stages of the Social Activist State” (1998) 32(2) L & Soc Rev 409.

<sup>69</sup> Kimberle Crenshaw et al, eds, *Critical Race Theory: The Key Writings that Informed the Movement* (New York: The New Press, 1995); Derrick A. Bell, Jr., “The Final Report: Harvard’s Affirmative Action Allegory” (1989) 87 Michigan L Rev 2382. Patricia Williams, *Alchemy of Race and Rights: Diary of A Law Professor* (Cambridge: Harvard U Press, 1992); Kimberle Crenshaw, “Race, Reform and Retrenchment: Transformation and Legitimation in Anti-Discrimination Law” (1988) 101 Harv. L. Rev. 1331; Mari Matsuda, “Looking to the Bottom: Critical Legal Studies and Reparations” (1987) 22 Harv. Civil Rights-Civil Liberties L Rev 323.

<sup>70</sup> See e.g. Jennifer Gerarda Brown, “‘To Give Them Countenance:’ The Case for a Women’s Law School” (1999) 22 Harv Women’s LJ 1; Valerie Fontaine, “Progress Report: Women and People of Color in Legal Education and the Legal Profession” (1995) 6 Hastings Women’s LJ 27.

evolved, law schools continue to teach according to a standard of “whiteness” which, for many, perpetuates a generalized experience of alienation from law.<sup>71</sup>

Although legal educators may not necessarily intend to perpetuate exclusion,<sup>72</sup> and often aspire to laudable goals,<sup>73</sup> critics argue that inherited pedagogical methods and expectations, norms of legal reasoning, and standards for evaluating “merit”<sup>74</sup> have the effect of perpetuating a tradition and practice of racial exclusion.<sup>75</sup> Critics suggest that traditional law school evaluation is hardly merit-based and neutral and that ranking methods preferentialize a white male normativity, have differential impact, and perpetuate disadvantage and bias.<sup>76</sup> They warn that the postures of “neutrality” or “objectivity” in the dominant modes of legal analysis and methods of evaluation operate to mask the reproduction of racial hierarchy.<sup>77</sup>

Law faculties have not been oblivious to these concerns and critiques. However, past and existing efforts at diversity promotion within law faculties are best described as a thin approach to diversity. Law school administrators have directed energies exclusively at closing the representation gap through equitable admissions policies. In so doing, they have failed to undertake the kind of curriculum reform needed to make the form and content of legal education a more inclusive experience, one that is more directly relevant to the experiences of the diverse society that law schools are now expected, and claim, to represent.

### III. THE FIRST WAVE OF DIVERSITY IN LEGAL EDUCATION

---

<sup>71</sup> Margalynne Joan Armstrong & Stephanie Wildman, “Teaching Race/Teaching Whiteness: Transforming Colorblindness to Color Insight” (2008) 86 N Carolina L Rev 635. See also Younes, *supra* note 9; Bandhar, *supra* note 9.

<sup>72</sup> Matsuda, “Affirmative Action and Legal Knowledge” *supra* note 26 (arguing that legal knowledge is constructed in an exclusionary way to ensure that outsider voices are perpetually marginalized).

<sup>73</sup> Jonathan Feingold & Doug Souza, “Measuring the Racial Unevenness of Law School” (2013) 15 Berkeley J Afr-Am L & Pol’y 71 at 73 (stating that “race-dependent burdens can arise in institutions and communities that expressly promote racial diversity and condemn overt racial discrimination; good intentions are no panacea to racial unevenness.”)

<sup>74</sup> See also Daria Roithmayr, “Deconstructing the Distinction between Bias and Merit” (1997) 85 Cal L Rev 1449 at 1452 [critiquing merit on the basis that law school admission standards necessarily embody race-conscious social preferences that existed at the time the standards were developed, and which “disproportionately exclude people of color and women because the standards historically have been developed by members of dominant groups in ways that end up favoring them”]. See also Kimberly West-Faulcon, “More Intelligent Design: Testing Measures of Merit” (2011) 13 U Pa J Const L 1235 [referring to social science evidence to argue that common law school admissions tests are not good predictors of future academic performance and lead to racial distortions based on an unsound theory of human intelligence].

<sup>75</sup> See *e.g.* Crenshaw et al, eds, *supra* note 61.

<sup>76</sup> Richard Delgado, “Rodrigo's Tenth Chronicles: Merit and Affirmative Action” (1995) 83 Geo LJ 1711. See also Roithmayr and West-Faulcon, *supra*.

<sup>77</sup> Younes, *supra* note 9; Rob Trousdale, “White Privilege and the Case-Dialogue Method” (2010) 1 Wm Mitchell L Rev 28 at 41 (describing the result of formal race neutrality as “a classroom environment that actively encourages the silencing of minority students. Forced to stand apart from their own self, minorities are generally more reluctant than their white counterparts to speak in the classroom”).

The first wave of diversity promotion in legal education was characterized by two main sites of administrative action: admissions and curricular offerings. After surveying each of these sites, I will posit that these measures have served an important purpose but offer only partial remedy, providing incomplete mitigation of the history of exclusion in legal education.

### **A. Targeted Admissions: Affirmative Action in Action**

Affirmative action in legal education was designed to admit members of identifiable, historically disadvantaged groups, with the goal of increasing the ranks of minority lawyers in the profession.<sup>78</sup> Access to an affirmative action program was conditioned on membership (usually through self-identification) in a targeted group. Targeted admission would typically consist of altering the “objective” criteria in admissions standards, while allotting weight to other factors that are designed to ameliorate the strength of minority applicants’ comparative profile. Although individual merit is conventionally the sole overriding criterion for law school admission, any unearned advantage conferred by affirmative action to the individual by virtue of group membership would be justified on the basis that it redresses historical wrongs (whose effects are systemic and ongoing) that affect individuals by virtue of their group membership.

When diverse life experiences or perspectives are seen as strengths sufficient to bolster or complement more conventional criteria (like undergraduate marks and LSAT scores), affirmative action can provide access to law school for individuals who might never have successfully applied. More importantly, affirmative action programs provide a concrete response to the history of formal and informal exclusion. Law schools benefit by being able to demonstrate better representation, at least formally, which boosts their image and legitimacy. Reversing the discrimination allows for more rapid systemic change than would otherwise occur in a more “neutral” arrangement over time, and this strategy is more manageable than less crude alternatives.

There was a sense of urgency when the American legal academy began to seriously consider race-targeted admissions as the solution to the representation deficit, which, at the height of the 1960s American civil rights movement, could no longer be ignored. In 1964, black Americans accounted for only about 1 per cent of law students and the same proportion of the legal profession. By 2001, blacks constituted 7.7 per cent of American first-year law students at ABA-accredited schools.<sup>79</sup> Though not the only factor, targeted admissions were key to increasing black access to law school

---

<sup>78</sup> Dolores Blonde et al, “The Impact of Law School Admission Criteria: Evaluating the Broad-Based Admission Policy at the University of Windsor Faculty of Law” (1998) 61 Sask L Rev 530 at 533.

<sup>79</sup> Richard Sander, “A Systematic Analysis of Affirmative Action in American Law Schools” (2004) 57 Stan L Rev 367 at 374.

(especially at elite law schools) and therefore to jobs in the profession. Later, affirmative action would drive an even more dramatic demographic shift to broader diversity by including other minority groups, in particular Hispanics, Asian-Americans, and Natives.<sup>80</sup>

The assumption behind affirmative action was that, although representation from minority groups would likely increase naturally over time, patience was not an option, both for functional and principled reasons. In the United States, with the civil rights struggle engaging directly issues of law and justice, the liberal establishment at the helm of legal education had to demonstrate commitment to the values of the legal profession at a time of significant political reorientation: “Gradualism as a philosophy of racial justice seemed discredited; many of those running both private and public institutions felt they had to do something rapid and dramatic to demonstrate progress in black access.”<sup>81</sup>

Affirmative action was always controversial in the United States and the issue has made its way to the US Supreme Court five times in 35 years.<sup>82</sup> In its 1978 decision in *Bakke*,<sup>83</sup> the Court very cautiously ruled on the constitutionality of race as a university admissions factor, outlining permissible parameters. Perhaps out of lawyerly prudence, ever since, American law schools have observed a “code of silence” on their affirmative action policies: “The relatively vibrant research and discussion about affirmative action that characterized the late 1960s and 1970s almost totally disappeared in the 1980s and 1990s.”<sup>84</sup> As a result, it became difficult to empirically track results of specific affirmative action programs. In Canada, by contrast, affirmative action received an explicit constitutional shield in section 15 of the 1982 *Charter*. It is therefore surprising how little data has been reported by Canadian law schools operating affirmative action programs. In a 1999 study of law school admissions across Canada, it was revealed that the majority of Canadian law schools “had not conducted any empirical studies or reviewed the efficacy of their admissions criteria and policies in any systematic way,”<sup>85</sup> including with respect to “affirmative action, special access, or discretionary admissions policies.”<sup>86</sup> It appears that little has changed, though further investigations are certainly warranted.

---

<sup>80</sup> In 1971, blacks accounted for more than two-thirds of all minorities enrolled in American law schools; by 2001, their proportion had dropped to just over one-third of the racialized student body. See Sander, *ibid*, at 386.

<sup>81</sup> *Ibid* at 378

<sup>82</sup> See *Regents of the University of California v Bakke*, 438 US 265 (1978); *Gratz v Bollinger*, 539 US 244 (2003); *Grutter v Bollinger*, 539 US 306, 342 (2003); *Fisher v University of Texas at Austin*, 570 U.S. \_\_\_\_ (2013). A further case, *Schutte v Coalition to Defend Affirmative Action*, was heard at the US Supreme Court in October 2013 and, at the time of writing, judgment was on reserve.

<sup>83</sup> *Bakke*, *ibid*. The Court established limits to the kind of affirmative action that may be employed.)

<sup>84</sup> Sander, *supra* note 68 at 385.

<sup>85</sup> Dawna Tong & W Wesley Pue, “Best and Brightest?: Canadian Law School Admissions” (1999) 37:4 *Osgoode Hall LJ* 843 at 855.

<sup>86</sup> *Ibid* at 854.

Notwithstanding the urgency of the rights revolution and a powerful consequentialist justification to reverse decades of discrimination, affirmative action has always been seen as a temporary measure, necessary in the short term to close the representation gap and level the playing field.<sup>87</sup> However, changing ethnic representation in law school was only one step in implementing an effective program for meaningful diversity promotion.<sup>88</sup> Because affirmative admissions policies do not directly address the underlying social forces that create exclusion in the first place, diversity factors in law school admissions have been found to offer only band-aid solutions.<sup>89</sup> The rising cost of law school tuition, the continued use of the LSAT,<sup>90</sup> law school assessment methods (namely, grading and ranking),<sup>91</sup> and timid implementation of affirmative action at some American schools have “combined to depress the number of minorities that are accepted and that ultimately graduate from law school and sit for the bar exam.”<sup>92</sup> In Canada, a qualitative review of the University of Windsor’s Faculty of Law admissions, conducted in the late 1990s, found that the school’s access policy constituted “one tool for increased racial diversity” but that “[a]dditional measures (over and above the passage of time) may be needed to achieve further racial diversity among members of the legal profession, including changes during law school and beyond.”<sup>93</sup>

As much as affirmative action admissions programs can be justified under theories of equality,<sup>94</sup> their practical value remains empirically contested.<sup>95</sup> Many indicators

---

<sup>87</sup> See *Grutter*, *supra* note 74 at 343, O’Connor J (stating, “We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the [diversity] interest approved today”).

<sup>88</sup> Johanna KP Dennis, “Ensuring a Multicultural Educational Experience in Legal Education: Start with The Legal Writing Classroom” (2010) 16 *Tex Wesleyan L Rev* 613 at 631-32 (“Admitting more students of color does not necessarily correlate into more competent attorneys of color being admitted to the bar”).

<sup>89</sup> Okechukwu Oko, “Laboring in the Vineyards of Equality: Promoting Diversity in Legal Education Through Affirmative Action” (1996) 23 *Southern U L Rev* 189 at 212.

<sup>90</sup> William C Kidder, “Does the LSAT Mirror or Magnify Racial and Ethnic Differences in Educational Attainment?: A Study of Equally Achieving ‘Elite’ College Students” (2001) 89 *Calif L Rev* 1055 (arguing that the LSAT is culturally biased in the sense that it creates an artificial barrier to entering the legal profession). See also, Phoebe A Haddon & Deborah W Post, “Misuse and Abuse of the LSAT: Making the Case for Alternative Evaluative Efforts and a Redefinition of Merit” (2006) 80 *St John’s L Rev* 41.

<sup>91</sup> Richard Delgado, “Rodrigo’s Tenth Chronicles: Merit and Affirmative Action” (1995) 83 *Geo LJ* 1711 (arguing that students admitted under affirmative action are evaluated based on constructions of “merit” that are rooted in historical patterns of exclusion).

<sup>92</sup> Patricia A Wilson, “Recreating the Law School to Increase Minority Participation: The Conceptual Law School” (2010) 16 *Tex Wesleyan L Rev* 577 at 578.

<sup>93</sup> Blonde et al, *supra* note 66.

<sup>94</sup> See *Gratz*, *supra* note 74. The US Supreme Court held that a “minority quota” system of affirmative action violated the equal protection rights of white applicants. In the sister case, *Grutter*, *supra* note 74, the Court held that using race as one among many factors in university admission decision-making was not unconstitutional. See 539 US 306 (2003). In Canada, s 15(2) of the *Charter* provides that the equality guarantee “does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.” See *supra* note 22.

suggest that the experience of racial minorities, once they are admitted to law school, is shaped by continued patterns of social and professional exclusion and academic underperformance. For example, a study of a number of American law school affirmative action programs revealed high rates of attrition of students admitted through such programs.<sup>96</sup> There remain ongoing problems of retention and completion of law school by minority students.<sup>97</sup> Evidence also suggests that minority students are “more at-risk, are more in need of academic support, are more likely to leave law school for financial reasons, and are more prone to failing the bar exam.”<sup>98</sup> Amongst elite American law schools, minorities are most often concentrated in the bottom half of their classes.<sup>99</sup> Poor performance in law school makes it harder to graduate and more onerous to launch a career in legal practice. While these difficulties cannot be traced causally to law school admissions policies alone, it is clear that well after the introduction of affirmative action, the minority experience in law school continued, to a surprising extent, to be shaped by the same patterns of exclusion and obstruction that members of those communities experienced outside the law.<sup>100</sup>

Affirmative action admissions programs have been found to work best when they are paired with robust academic support throughout law school.<sup>101</sup> This approach helps to alleviate the ingrained tendency of legal education to exclude members of historically disadvantaged or outsider communities.<sup>102</sup> But it also highlights that, notwithstanding the positive goals of affirmative action, structural obstacles to many

---

<sup>95</sup> See *e.g.* Sander, *supra* note 68 at 370 (suggesting that minority students would be better off attending lower ranked law schools to which they can be admitted without the need for affirmative action). For a contrary view, see William C Kidder & Richard O Lempert, “The Real Impact of Affirmative Action in American Law Schools: An Empirical Critique of Richard Sander’s Study” (2004) 57 *Stan L Rev* 1855.

<sup>96</sup> Sander, *supra* note 68.

<sup>97</sup> Carole J Buckner, “Realizing Grutter v. Bollinger’s ‘Compelling Educational Benefits of Diversity’ – Transforming Aspirational Rhetoric Into Experience” (2004) 72 *UMKC L Rev* 877 at 888 (linking lack of engagement with minority issues in class with feelings of alienation by minority law students).

<sup>98</sup> Dennis, *supra* note 76 at 630 (also citing the fact that the ABA has identified students of colour as “at-risk” with respect to passing the bar examination). See also Anupama Ramlackhan, “Leveling the Playing Field in Law School: A Look at Academic Assistance Programs for Minority Law Students” (2006) *J Race, Gender & Ethnicity* 27 at 31; Sander, *supra* note 68 at 426-67.

<sup>99</sup> Wilson, *supra* note 80 at 581.

<sup>100</sup> See *e.g.* Rachel F Moran, “Diversity and its Discontents: The End of Affirmative Action at Boalt Hall” (2000) 88 *Calif L Rev* 2241 at 2283-2285 (finding issues of race and gender “largely ignored within the law school curriculum”); Walter A Allen & Daniel G Solorzano, “Affirmative Action, Educational Equity and Campus Racial Climate: A Case Study of the University of Michigan Law School” (2001) 12 *Berkeley LJ* 237 (describing a sample law school environment as replete with segregation and racial conflict). For recent findings, see Feingold and Souza, *supra* note 65 at 114, concluding in a 2013 study at UCLA Law School that “[r]acial unevenness and its concomitant burdens are a reality for Students of Color at UCLA Law... [which is] likely far from unique in this regard.”

<sup>101</sup> See Ramlackhan, *supra* note 86. See also Richard Cabrera & Stephanie Zeman, “Law School Academic Support Programs—A Survey of Available Academic Support Programs for the New Century” (2000) 26 *Wm Mitchell L Rev* 205.

<sup>102</sup> See Adam G. Todd, “Academic Support Programs: Effective Support Through a Systemic Approach” (2002-2003) 38 *Gonz L Rev* 187 at 189 (noting the contributions that academic support programs have made to law schools generally).



minority students do not disappear simply because they are admitted to law school. Indeed, academic support may help to mitigate exclusion by enabling outsider students to navigate the extra hurdles they face in a structurally adverse environment. It does not, however, on its own, remedy the underlying causes of exclusion.

No doubt, affirmative action has removed some barriers and created new opportunities that did not exist before. Increasing access to legal education for members of historically excluded groups has enabled certain minorities to move from “outsider” status to “insider,” and to achieve professional success. But it has also created new challenges in a social landscape shaped by underlying systemic inequalities. For these reasons, it is helpful to remember that affirmative action has always been understood by its primary defenders and by the courts as a tool, not a goal. In terms of diversity, it can help create the conditions for achieving meaningful diversity in the law school by constituting a statistically diverse student body.<sup>103</sup> This is, however, a precondition to the more important task of incorporating diversity into the way we understand legal knowledge, skills, reasoning, rules, and authority, as well as how these things are conveyed pedagogically.

## **B. Curriculum and Teaching Reform: Making Outsiders Insiders**

The second area of first-wave diversity promotion in the law school came in modest curriculum reform that led to the diversification of course offerings. This area has been well studied in Canada. Scholars refer to seminars that focus on experiential and theoretical perspectives of members of marginalized communities as “outsider” courses.<sup>104</sup> Like affirmative action in admissions, reform that incorporates outsider courses into the curriculum is justified on equitable grounds for providing a space to pay special attention to the relationship between law and marginalized groups: “Outsider courses offer the very real possibility of creating environments in which otherwise silent voices have not only space, but credibility and perhaps even power.”<sup>105</sup>

Indeed, framing cases in terms of a particular perspective can give voice to questions and commentary about issues of identification for law students who may not otherwise find opportunities in core curriculum courses to explore such issues. Not surprisingly, one of the first “outsider” courses taught in Canada was “Women and the Law,” offered in 1972-73 at Osgoode Hall Law School.<sup>106</sup> At the time, Osgoode’s upper-

---

<sup>103</sup> Similarly, diversity in faculty is a related, though distinct, issue. See generally Kellye Y. Testy, “Best Practices for Hiring and Retaining a Diverse Law Faculty” (2011) 96 Iowa L Rev 1707.

<sup>104</sup> Natasha Bakht et al, “Continuing Outsiders: A Critical Exploration of Outsider Course Enrollment in Canadian Legal Education” (2007) 45 Osgoode Hall LJ 671.

<sup>105</sup> *Ibid* at 674.

<sup>106</sup> *Ibid* at 694.

year student population of 518 included 69 women.<sup>107</sup> With time, the relative enrolment in feminist courses declined as the variety and volume of outsider offerings multiplied, especially by the 1990s.<sup>108</sup> Yet, while critical and outsider perspectives could be found on the periphery, little was altered in the core of legal education. Most North American law schools persisted in a failure to adequately integrate critical, counter-dominant discourses and social commentary about the law into the core curriculum.<sup>109</sup> Even as law schools have moved away from “legal fundamentalism” and embraced socio-legal approaches, this has been matched by a curious persistence of the narrow, doctrinal pedagogical tradition.

Indeed, despite the resilience of its traditions, the content, form and methods of legal education have always been subject to critique: “For a century or more, legal scholars (and some thoughtful practitioners and judges) have one way or another insisted upon the indeterminacy of legal decisions, the historical contingency of legal institutions and processes, and the cultural variability of what people understand ‘law’ to be.”<sup>110</sup> The American Legal Realists of the early twentieth century highlighted the gap between doctrinal study and the lived experience of law, focussing on the disjuncture between appellate decision-making (the focus of law school instruction) on the one hand, and the reality of legal practice on the other.<sup>111</sup> Decades later, critical race and feminist scholars brought their experiences with the law to their scholarly interpretations. They developed compelling critiques of traditional case method instruction for its tendency to express the law in abstractions and marginalize lived realities of how law is experienced, especially by members of disadvantaged groups.<sup>112</sup>

The critical race and feminist perspectives on law created a discourse linking the general observations of the legal realists and the critical legal studies movement with a race- and gender-conscious exposition of law in all its manifestations: doctrine, legal

---

<sup>107</sup> Osgoode Hall Law School historical class records accessed by, and on file with, the author. These figures are derived from the graduating class lists of 1973 and 1974, the members of which would have comprised the 2L and 3L classes in the 1972-1973 academic year.

<sup>108</sup> *Ibid* at 696-98.

<sup>109</sup> See Richard Delgado, “The Imperial Scholar: Reflections on a Review of Civil Rights Literature” (1984) 132 U Pa L Rev 561 (critiquing the “closed club” of academic legal commentary, particularly in prestigious publications). See also Matsuda, “Affirmative Action and Legal Knowledge” *supra* note 26 at 2-5 (describing the “segregation” or “apartheid in legal knowledge” between established scholarly authority and “outsider” women and people of colour); Duncan Kennedy, “Legal Education and the Reproduction of Hierarchy” (1982) 32 J Legal Educ 591.

<sup>110</sup> Harry Arthurs, “‘Valour Rather Than Prudence’: Hard Times and Hard Choices for Canada’s Legal Academy” (2013) 76 Sask L Rev 73 at 83 (referring to the Canadian academy). For the American experience, see Spencer, *supra* note 3 (tracing 130 years of American critique of doctrinal legal education).

<sup>111</sup> See Brian Leiter, “American Legal Realism” (Univ. Tex. Pub. Law Research Paper, Research Paper No. 042, 2002), online: <http://ssrn.com/abstract=339562>.

<sup>112</sup> See e.g. Kimberle Crenshaw et al. eds, *supra* note 61; Richard Delgado & Jean Stefancic, eds, *Critical Race Theory: the Cutting Edge* (New York: The New Press, 1995); Derrick Bell & Erin Edmonds, “Students as Teachers, Teachers as Learners” (1993) 91:8 Mich L Rev 2025.

reasoning, institutions, professional responsibility and ethics, and, of course, legal education. Perspectives grounded in subjective experiences of minorities, such as queer, disabled, Indigenous, and Latino, among others, gave rise to numerous offshoot branches of critical scholarships. Literature in law reviews, especially from the 1990s onwards, began to capture the perspective of racialized faculty and reflect critical discourses. Many such faculty members meditated on issues in the law school, including facing hostility from students for raising racial justice issues in doctrinal or “core” courses.<sup>113</sup>

The critique of law as complicit in historical and ongoing systemic racial oppression, which was a core claim of the critical race school, is linked to the practices and assumptions of legal education as well. Curricula tied to appellate doctrine rather than contextual understandings of law-in-action diminish the realities of minorities’ lives under the law. Unengaged and outmoded methods of instruction, such as the case method and Socratic dialectic, heighten existing power imbalances in the classroom, reward entitlement, and make outsiders feel even more alien. Evaluation methods that reflect a biased ordering of lawyering knowledge and skill—placing, as these do, abstract analytical reasoning at the top and experienced subjective realities at the bottom—again arbitrarily magnify perspectives of privileged law students while minimizing those of minority students. And a faculty composition that remains startlingly ethnically homogeneous causes minority students to doubt the credibility of law schools’ commitments to diversity.<sup>114</sup>

Little is done to educate students of colour uniquely about what it means to be a lawyer of colour.<sup>115</sup> Meanwhile, white students who do not actively seek out racialized perspectives on the law are likely to spend negligible time reflecting on the differential impact of law on non-majority sectors of society. This has led some to call for a program of multicultural “hypereducation,”<sup>116</sup> whereby all students are instructed about the linkages between the reality of diversity and the norms of equality. This would only be successful if embedded in core legal instruction, not shunted to the periphery of the curriculum. The justification for such a proactive approach to diversity can be traced back to the public function of the lawyer and the unique power and influence that attach to legal professionalism. The goal of an explicit commitment to multicultural education is to produce the “Atticus Finches of

---

<sup>113</sup> Robert S Chang and Adrienne D Davis, “An Epistolary Exchange Making Up is Hard to Do: Race/Gender/Sexual Orientation in the Law School Classroom” (2010) 33 Harv J L & Gender 1; Peter Goodrich and Linda G Mills, “The Law of White Spaces: Race, Culture, and Legal Education” (2001) 51:1 J Legal Edu 15; Armstrong & Wildman, *supra* note 61.

<sup>114</sup> Spencer, *supra* note 3. Even as most faculties now have strong female representation and there are many examples of female law school deans across the United States (and Canada), the pace of racial representation has been markedly slower. See Cukier et al, *supra* note 8.

<sup>115</sup> A 2013 empirical study at UCLA Law School measuring racial “unevenness” found that “Students of Color experienced far greater levels of stigma consciousness than their White colleagues.” Meanwhile, “White UCLA Law students overwhelmingly proceed through law school without ever consciously thinking about their own whiteness.” See Feingold & Souza, *supra* note 65 at 112-113.

<sup>116</sup> Dennis, *supra* note 76 at 632.

tomorrow today.”<sup>117</sup> Both white and non-white students stand to benefit and learn from a diversity pedagogy that is rooted in a commitment to substantive equality. A student’s personal experience as a racialized person, for example, does not predetermine an ability to competently meet the needs of the culturally diverse, minority client. Nor does a student’s whiteness necessarily prevent her from empathizing with the condition of a racial minority. In a “multicultural hypereducation” curriculum, instructors actively subvert stereotypes and biases and help students to see how the law operates to reinforce social, cultural, and economic status markers, and they also show how the law can be deployed to challenge existing hierarchy and power imbalances.

Outsider courses keep outsider perspectives on the periphery of legal education and do little to transform the core. Students who do not initiate contact with outsider perspectives are unlikely to encounter such perspectives, and if they do, it is likely to pass as a missed opportunity.<sup>118</sup> If the goal is to draw attention to perspectives on law that are analytically important, then the question is whether doing so by way of optional, specialized, segregated courses will generate the kind of change needed to make marginal voices more relevant to mainstream legal analysis. To the extent that calls for legal education reform include more focus on practical knowledge and applied skills, the relevance of outsider course material will become significant. No serious conception of “practice readiness” can neglect the importance of cultural competencies and an appreciation for the interplay of law, power and privilege. Shifts in accreditation and standard-setting offer an opportunity to reorient legal pedagogy towards integrating the understanding of subjective experiences with law with skills, theory and doctrine.

What the above suggests is that without significant curriculum reform, first-wave efforts over-promise with respect to diversity. Though not universally true, a segment of the minority student community who tend to strongly identify as racialized and who pervasively manifest that identity can expect to experience law school as alienation in many, if not most, respects. Targeted admission can come at high personal cost for minority students, forced to carry burdens that members of dominant social groups do not have to shoulder.<sup>119</sup> In finding refuge in outsider courses, students risk permanently labelling themselves outsiders to the legal mainstream, setting an even steeper uphill path to professional success. All of this can have the effect not only of perpetuating historical patterns of racial disadvantage, but also of creating new patterns of insider-outsider exclusion.<sup>120</sup> This contributes to the perpetuation of historical patterns of exclusion in the law school and in the legal

---

<sup>117</sup> *Ibid.*

<sup>118</sup> Feingold & Souza, *supra* note 65 at 112-113. .

<sup>119</sup> *Ibid.* at 73 (arguing that racial unevenness arises from environmental factors and institutional culture independent from any identifiable perpetrator).

<sup>120</sup> See Sander, *supra* note 68 at 410 (describing the “cascade effect” caused by an over-representation of blacks in elite law schools, leaving an ever wider divide between black and non-black students at lower tier law schools).

profession, even as some members of historically excluded groups excel and succeed in conventional career paths that may previously not have been available to members of their communities.

### C. Diversity and Access to the Profession

Nowadays, it is not only morally desirable for law schools to showcase diversity, it also can benefit a law faculty's profile. The law school can attract the brightest stars from racialized communities by offering a diverse and welcoming environment, a sampling of perspective courses with attractive titles, and a system of professional counselling and supported access to the competitive job market. However, while the law school is the forum in which students are typically first introduced to law firms, it is the firms and members of the profession, not the school, that determine the students' access to professional training, entry to professional culture, and opportunities for employment. The schools deliver graduates to the profession but have no authority over student job placement or firm hiring decisions.

In a very meaningful sense, then, law firms hold the key to professional access for many students. In Ontario, as in all Canadian provinces, every law graduate must secure a training position under the stewardship of a senior member of the profession.<sup>121</sup> This makes "students-at-law"<sup>122</sup> literally beholden to the members of the profession—and, increasingly, to the law firms—to admit them to professional membership. Despite the dominance of law firm involvement in formal law graduate training through articling programs, law firms fall outside the regulatory purview of law societies and bar associations.<sup>123</sup> With the gradual move away from articling requirements and a decreased reliance on law firms for training, the responsibility for training "practice-ready" graduates now more than ever falls on the law schools.<sup>124</sup>

---

<sup>121</sup> In Ontario, a supervising lawyer must have three years' experience at the bar. This was lowered from 10 years in response to a growing "articling crisis" in the province, whereby estimates reach 15 per cent as the number of law graduates unable to qualify for the bar due to lack of articles. On November 22, 2012, the Pathways pilot project was launched, allowing lawyer licensing candidates to complete a Law Practice Program (LPP) as an alternative to articles, starting in the 2014-15 licensing year. See, The Law Society of Upper Canada, *Pathways to the Profession: A Roadmap for the Reform of Lawyer Licensing in Ontario* (Final Report of the LSUC Articling Task Force, 25 October 2012) at 13, online: <<http://www.lsuc.on.ca/WorkArea/DownloadAsset.aspx?id=2147489848>>. A concern is that the LPP alternative will stigmatize underprivileged and under-represented minorities, who are less likely to secure traditional articles. See Jean Ko Din, "Ryerson law practice program nets praise, skepticism" *The Ryersonian* (November 26, 2013).

<sup>122</sup> "Student-at-law" is the designation for law students in Ontario until they are admitted to the bar. The term "student-at-law" does not appear in the *Law Society Act* [and it appears obliquely in the *Courts of Justice Act* and the *Juries Act*], but it is defined on the following webpage: The Law Society of Upper Canada, *Student-at-Law Rights of Appearance* (2013), online: <<http://www.lsuc.on.ca/ArticlingRightsofAppearance/>>.)

<sup>123</sup> See Adam M Dodek, "Regulating Law Firms in Canada" (2011) 90 Can Bar Rev 383.

<sup>124</sup> See discussion at fn X concerning practice readiness as a core competency for the purpose of law school accreditation..

Thus, if students experience exclusion and underperformance in law school, they are more likely to encounter systemic obstacles in their career.

Indeed, the numbers in Ornstein's research suggest only modest and slow change in the diversity direction at all levels of legal practice.<sup>125</sup> There is plenty of cause for concern upon closer analysis of the data.<sup>126</sup> At the general level, the places where diversity inadequacies remain virtually unchanged are in the highest levels of influence and authority. Whether in the law firms, the law schools, or the judiciary, racial and ethnic minorities are not only underrepresented, they are virtually absent, especially from upper echelons.<sup>127</sup> Law school commitments to diversity offer the promise of a self-fulfilling career in the law, in a legal culture which celebrates difference and accommodates a multitude of perspectives. However, when students enter the profession, they encounter a world that is slow to change and rooted in a culture that will appear foreign and inhospitable to many. For the minority student who has already experienced alienation in legal education, it may be an unsurprising realization to be out of place in the profession. Given the pattern of female attrition from the large law firms following the rapid entry of women into the profession,<sup>128</sup> racial diversity statistics suggest that a similar pattern might already be underway among racial minorities.

#### IV. TOWARDS DIVERSITY PEDAGOGY

The law school is a site of production not only of lawyers, but also of law itself. Through decisions about faculty composition, student admissions, research and

---

<sup>125</sup> *Supra* note 8 at i-ii, 5, 7, 9, 18.

<sup>126</sup> For example, the data illustrate for the first time clear evidence of massive disparities between different social groups, such that some minorities are statistically over-represented in law school, while others are under-represented. See *ibid*.

<sup>127</sup> Diversity Institute, *Improving Representation in the Judiciary: A Diversity Strategy* (Toronto: Ryerson University, 2012) at 14; Diversity Institute, News Release, "Research from Ryerson University Finds Increased Representation of Women in Canada's Judiciary, but Visible Minorities Left Behind" (27 June 2012) online: <<http://www.ryerson.ca/diversity/news/2012-06-27.html>> (noting that "[v]isible minorities are all but absent among Federal appointments to the courts and the selection process"). Ornstein observes that:

In Ontario in 2006, members of a visible minority accounted for 30.7 percent of all physicians, 31.7 percent of engineers, 17.6 percent of academics and 11.8 percent of high-level managers, compared to 11.5 percent of lawyers. This suggests that potential immigrants who are already lawyers in countries with dissimilar legal structures believe they will be unable to translate their skills in Canada as easily as other professionals. Even immigrants who come to Canada when they are young children are disadvantaged in pursuing a legal career.

See *supra* note 8 at ii. See also *Carasco v University of Windsor*, 2012 HRTO 195 (application filed with the Human Rights Tribunal of Ontario (HRTO) alleging systemic racial discrimination in a law school decanal appointment process and highlighting a history of white privilege in law school governance).

<sup>128</sup> See e.g. The Law Society of Upper Canada, *Consultation Report: Retention of Women in Private Practice Working Group* (LSUC, 2008), online: <<http://www.lsuc.on.ca/media/retentionofwomen.pdf>>; *Change of Status Research, 2010-2012: Report of the Key Findings Submitted to the Law Society of Upper Canada* (LSUC, May 2013) at 39, online: <<http://www.lsuc.on.ca/WorkArea/DownloadAsset.aspx?id=2147495177>>.

curriculum, law faculties determine the knowledge, skills, and priorities that define and constitute the law to a greater extent than they have tended to acknowledge.<sup>129</sup> The law school also transmits and assimilates the norms, behaviours, and ethics that shape the professional identity. There are implications to the claim that the law school establishes—or plays a significant role in establishing—the normative approach to law and lawyering.

Diversity pedagogy offers an account of legal education that weaves diversity into the forms and practices of law. To achieve this, diversity pedagogy seeks to move beyond thinking about how to make the dominant legal establishment more accessible to “outsiders” to a more concentrated focus on revising and re-orienting the definitions and functions of lawyering. This involves a pedagogical and administrative reorientation to producing an institutional and professional culture, reflected in curriculum, that is expressly and comprehensively built on equality-positive assumptions.

Diversity pedagogy is both a theoretical and practical program.<sup>130</sup> While I do not seek to prescribe a specific set of pedagogical instruments, exercises, or experiments to implement the general prescriptions offered here, we can recognize that legal educators perform two sets of functions: they choose and define the scope and content of legal knowledge; and they transmit that knowledge through doctrinal instruction, practical and skills training, and ethical framing. By harmonizing the core functions with a properly theorized diversity commitment, and by implementing them alongside targeted, diversity-enhancing institutional initiatives, these pedagogical methods can and should be applied creatively and flexibly across different law school settings, according to local diversity needs and goals.

### **A. Beyond Celebrating Difference: Meaningful Representation**

To overcome the insufficiency of first-wave measures, and to promote a more robust conception of diversity, law schools will no doubt have to continue to work to diversify law school classrooms, in terms of both admitting minority students as well

---

<sup>129</sup> Legal educators never have absolute discretion to determine curricular content and educational programming. In the United States, the American Bar Association accredits law schools and most state bar associations only permit graduates of ABA-accredited institutions to be admitted to practice. In Canada the Federation of Law Societies, and provincial law societies, play a similar role. Since about 1960, an informal agreement between the Canadian legal academy and the professional regulators allowed the law schools to determine with virtually no oversight the content of legal education. It has been noted that “this mutually beneficial détente ended abruptly in 2009” when, “[f]or the first time in the recent history of Canadian legal education, the profession’s governing bodies were formally asserting their claim to be entitled to tell law schools what they must teach, to whom, and to some extent, how.” See Arthurs, “Valour Rather Than Prudence,” *supra* note 96 at 81.

<sup>130</sup> This is a description of the theoretical basis on which a pedagogy of promoting meaningful and impactful diversity norms could and, in my view, should be pursued. The task of experimenting with implementing theory is another project altogether. As a teacher who attempts to implement ideas of diversity pedagogy, my theoretical frame is certainly informed and shaped by classroom experience.

as appointing minority faculty members. But it has become clear that the benefits of diversity do not flow automatically upon adjusting representation. Evidence suggests that minorities tend to either assimilate intellectually and culturally in order to succeed in law school and in practice, or they do not assimilate and experience law school and professional life as alienation. While representation is, normatively, a defensible and necessary condition, it is but a partial and preliminary measure. What is needed is the development of a more thorough program of diversity/equality, both in legal education and in the profession.

Greater academic support and the introduction of “outsider courses” have been important to provide for minority student needs and to affirm their place inside the law school. However, these types of measures offer false comfort: while they may ease the student’s entry to and passage through law school, they do not provide a vehicle for meaningful engagement with diversity issues, nor do they resolve for the minority student the homogenizing pull within conventional legal pedagogy. What is required is an approach to teaching and training that integrates critical voices within legal education and scholarship and embraces the pedagogical centrality of pluralist narratives in legal history, doctrine, analysis, and reasoning. Far too little scholarship has been devoted to developing the connections between pluralist and counter-dominant approaches to law and the qualities of good lawyering.<sup>131</sup> This seems to be where the most important work for diversity pedagogy lies: in creating space for different ways to think and behave as a lawyer, not only as a matter of competent service delivery, but also as a matter of individual self-fulfilment.

Indeed, if diversity demands the celebration of difference as a way of promoting equality, there must be some content to the kinds of differences that are celebrated within the diversity paradigm. Diversity also demands a re-evaluation of the kinds of norms that shape the professional model, or range of models, to which students aspire. Normative writers have focussed on infusing the reconstructed lawyer model with a commitment to justice, equality, and “do no harm.”<sup>132</sup> How this infusion is achieved involves tailoring legal education to both re-orient the prevailing model of lawyering and change the characteristics of professional self-image.

The goal for a reformed legal education should be to present the possibility of a lawyer identity to which any student can ascribe or aspire not because it is neutral but because it is inclusive. This can assist in combatting some of the adverse effects of diversity’s vulnerability, such as the attrition of women and minorities from the

---

<sup>131</sup> Trevor CW Farrow, “Ethical Lawyering in a Global Community” (Osgoode Hall Law School Comparative Research in Law & Political Economy Research Paper No 9/2013) at 13, online: <<http://ssrn.com/abstract=2192512>>.

<sup>132</sup> See e.g. David Tanovich, “Law’s Ambition,” *supra* note 21 (articulating an approach to ethical responsibility rooted in the promotion of justice). See also Rosemary Cairns Way, “Reconceptualizing Professional Responsibility: Incorporating Equality” (2002) 25 Dal LJ 27 (proposing an “equality seeking ethic” as a core professional responsibility); Duncan Kennedy, “The Responsibility of Lawyers for the Justice of Their Causes” (1987) 18 Texas Tech L Rev 1157 (urging a “do not harm” ethic).



profession.<sup>133</sup> By re-orienting all aspects of legal reasoning, analysis, doctrine, and practice to align with the practical, moral, and political commitments implied in a diversity ethic, the law school can lead a reform agenda that can be expected to have long-term, lasting impact not only on legal education, but also on the entire legal profession.

## **B. Teaching Transformation: Implementing Inclusion**

The primary theoretical challenge of implementing diversity in legal education is to determine how best to subvert the dominance of the inherited models, critically assess what is valuable (and what is not), and then work on improving approaches to legal education to reflect the professional norms of a reconstituted idea of what constitutes legal analysis and practice. Transforming professional norms, practices, and behaviours is no modest task in a profession that is generally resistant to change:

Employing only moderate poetical licence, it could be said that nothing fundamental distinguishes present educational practices from those of Toronto in 1968, Vancouver in 1945, Winnipeg in 1920, Halifax in 1900, or Oxford in 1885. Contemporary common law legal education takes its form from schemes launched by elite Anglo Canadian lawyers a century ago.<sup>134</sup>

The traditional form of legal education has helped reinforce the dominant culture of the profession, described as being through most of its history, “xenophobic, elitist and generally aligned with capital interests against ordinary citizens.”<sup>135</sup> Responding to this legacy with repudiation, scholars in the legal ethics field have used history as moral justification for fundamentally re-conceptualizing the role of the lawyer in the legal system and in society.<sup>136</sup> The project of linking ethics and professionalism to mainstream legal education is as much aligned with the diversity imperative as it is a further example of outward pressures on the scope of what is considered “relevant” and “central” to understanding the law.<sup>137</sup> Legal ethics necessarily speaks to

---

<sup>133</sup> See Ornstein, *supra* note 8; CBA, *Touchstones*, *supra* note 11; ABA, *Next Steps*, *supra* note 8.

<sup>134</sup> Rochette & Pue, *supra* note 53.

<sup>135</sup> W Wesley Pue, “In Pursuit of Better Myth: Lawyers’ Histories and Histories of Lawyers” (1995) 33 *Alta L Rev* 730 at 762-763.

<sup>136</sup> The emerging field of Canadian legal ethics demonstrates a strong push towards incorporating diversity values and justice principles into the model lawyer. See *e.g.* Adam M Dodek, “‘Canadian Legal Ethics’: A Subject in Search of Scholarship” (2000) 50 *UTLJ* 115; Adam Dodek, “Canadian Legal Ethics: Ready for the Twenty-First Century at Last” (2008) 46 *Osgoode Hall LJ* 1; HW Arthurs, “Why Canadian Law Schools Do Not Teach Legal Ethics” in Kim Economides, ed, *Ethical Challenges to Legal Education & Conduct* (Oxford: Hart Publishing, 1998); Allan Hutchinson, “Calgary and Everything After: a Postmodern Re-vision of Lawyering” (1998) 33 *Alberta L Rev* 768.

<sup>137</sup> See W Wesley Pue, “Becoming ‘Ethical’: Lawyers’ Professional Ethics in Early Twentieth Century Canada” (1991) 20 *Man LJ* 227.

theoretical and practical questions about legal education.<sup>138</sup> As ethics becomes a more directed focus of attention in the profession, the teaching of legal ethics and modelling of professional conduct will reach even greater importance. With this confluence, normative ethics and diversity pedagogy overlap considerably.

There is also, as always, constant reciprocal influence between the law schools and the legal profession. The firms rely on law faculties to supply their existing service systems by producing competent graduates. As law firms have played a decreasing role in lawyer training over the past several decades, they have come to rely increasingly on the law schools to produce “practice-ready” graduates. But the profession also looks to the academy to explain the law, and to describe the legal imagination and scope of possibility. With the focus on law firm hiring processes, the extent of influence that the legal academy has over the *future* of the profession is often under-estimated in the face of the perceived dominance of the profession (large firms in particular) over *present* job prospects for students.

All of this is to emphasize that law schools are natural leaders in shaping the law and should embrace diversity pedagogy boldly with a view to transforming classrooms and curricula, as well as norms that constitute core values and priorities of the profession.

## V. THEORY + PRACTICE + REFLECTION

*Give the pupils something to do, not something to learn; and the doing is of such a nature as to demand thinking, or the intentional noting of connections; learning naturally results.*<sup>139</sup>

If diversity in legal education is the goal, this article has thus far suggested that inadequate institutional strategies have failed to promote a meaningful conception of that goal. Diversity pedagogy calls for a re-conceptualization of the normative model of lawyering that is produced in law school. The following section provides a general proposal of how that can be achieved. I argue, first, for disrupting the “science of law” approach that has dominated the core of legal education for more than a century. This is not to turn the study of law into an anti-intellectual exercise, but rather to enhance and make more meaningful student intellectual engagement with the study of law. There is little intellectual value in a method that mutes lived experiences and emphasizes abstractions over realities. Next, I argue that the concept of “practice readiness” is the wrong focus of skills training, but is not necessarily a wrong-headed approach. With sufficient and appropriate theoretical grounding, critical tools and structured reflection, “skills training” can provide an environment where, to quote

---

<sup>138</sup> See e.g. David Tanovich, “Learning to Act Like a Lawyer: A Model Code of Professional Responsibility for Law Students” (2009) 27 Windsor YB Access Just 75.

<sup>139</sup> John Dewey, *Democracy and Education: An Introduction to the Philosophy of Education* (New York: MacMillan, 1916) at 181.

Dewey, “learning naturally results”. To this end, I connect the diversity imperative to the theory, forms, and specific outcomes of experiential education.

## **A. The Dominion of Doctrine**

Traditional legal pedagogy relies heavily on the “case method” of instruction. Despite curriculum modifications, the case method remains the dominant mode of doctrinal instruction in the first-year curriculum and in much of the upper-year offerings at law schools across Canada and the United States.<sup>140</sup> The case method is rooted in an understanding of legal analysis as a science. It seeks to organize the law into a system of knowable, predictable, and neutral rules and principles that can be applied generally in any fact situation.<sup>141</sup> In teaching the law from this perspective—with a focus on the abstract rules—law comes to be understood as a coherent system of conclusions, reached through a process of objective analytical reasoning.

It is widely understood that the case method as a sole mode of legal instruction is unduly narrow. The American legal realists of the early 20<sup>th</sup> Century took aim at its excessive reliance on formalistic application of principles under a pretence of neutrality and predictability, oblivious to context. They argued that legal education must do more than teach cases in order to adequately prepare future lawyers for the contextual contingencies of real-world lawyering.<sup>142</sup> Because the case method mutes or excludes factors that are arguably relevant in any given case, this can have an objectifying impact on members of minority groups who identify with the “other” side of a rule in the face of a dominant frame that treats rules as inherently objective, legitimate and fair.<sup>143</sup>

The case method is also criticized for failing to account for arbitrary factors, such as the personal characteristics and political preferences of judges exercising decision making power.<sup>144</sup> It inadequately considers social fact variables and leaves no room for serious self-critique within the discourses of legal analysis and reasoning. The case method assumes that legal language is rational and effective, that precedents deserve respect, that the Constitution is legitimate, that formal justice is just, that litigants are generally equal, and that the rule of law is the best bulwark against tyranny. Yet, the case method’s attachment to assumptions that only make sense when presented in the abstract can create actual alienation for students who have experienced or witnessed the law in ways that challenge these underlying assumptions. Objectivity and neutrality in legal analysis, presented without critique or caution in traditional case

---

<sup>140</sup> Spencer, *supra* note 3.

<sup>141</sup> For a classic articulation of the science of law approach, see Oliver Wendell Holmes, “The Path of the Law” (1897) 10 Harv L Rev 457 at 458 [describing the “body of dogma or systematized prediction which we call the law”].

<sup>142</sup> See Jerome Frank, “A Plea for Lawyer-Schools” (1947) 56 Yale LJ 1303 at 1315.

<sup>143</sup> Crenshaw, “Race-Conscious Pedagogy,” *supra* note 59 at 36-40.

<sup>144</sup> See Brian Leiter, *supra* [outlining the various strands of this critique within Realist writings].

method reasoning, can have exclusionary effects in legal education when it discounts as irrelevant non-conformist and diverse perspectives:

[B]ecause of the dominant view in academe that legal analysis can be taught without directly addressing conflicts of individual values, experiences, and world views, these conflicts seldom, if ever, reach the surface of the classroom discussion. Dominant beliefs in the objectivity of legal discourse serve to suppress the conflict by discounting the relevance of any particular perspective in legal analysis and by positing an analytical stance that has no specific cultural, political, or class characteristics.<sup>145</sup>

Thus, it is the depersonalization and decontextualization of the law in traditional case method analysis that tends to accentuate the exclusionary impact of law on some minority students. The challenge is that this depersonalization of the law is part of what the case method claims as foundational to its posture of neutrality. Many law professors do highlight the false pretensions of neutrality and colourblindness in judicial interpretations. But this is no easy task: faculty who attempt to integrate perspectives (critical, racial, feminist, etc.) into legal analysis, risk being accused of lacking objectivity, propagandizing, or failing to teach relevant material.<sup>146</sup> This is a direct by-product of the case method, which devalues social context and critical theoretical approaches. If students are taught that doctrine is all that matters, they will resist attempts at diversifying the content of core courses. Student responses are a reflection of the values and priorities set by the law school. Individual instructors who, despite assurances of academic freedom, have little incentive to be creative or experimental in the delivery of “core” subjects.<sup>147</sup> Stated commitments to diversity and transformation do little to change student expectations when the curriculum and classroom reproduce traditional priorities and privilege established perspectives.

## **B. Learning Law by Doing Law: Broadening Skills**

One of the primary functions of North American law schools is to prepare JD graduates for the legal job market and to begin the student’s socialization into professional culture. Teaching students how to read a case and to understand its logic

---

<sup>145</sup> Crenshaw, “Race-Conscious Pedagogy”, *supra* at 2.

<sup>146</sup> Chang & Davis, *supra* note 99

<sup>147</sup> The reasons for this are many, including formal and informal pressures to cover huge amounts of material and market-consumer pressures to conform to dominant forms of instruction, and institutional pressures for teaching to be more “efficient”. See Herbert N. Ramo, “Moving Students from Hearing and Forgetting to Doing and Understanding: A Manual for Assessment in Law School” (2013) 41 Cap U L Rev 837 at 885 [arguing that “change [in teaching and evaluation methods] will not come easily because it must take place at every level of the law school. Administrators must reward faculty who engage in innovative teaching practices, not just those who publish most frequently. Teachers must be willing to spend the time needed to modify their current teaching practices to incorporate the more frequent assessments of their students. Finally, students must become willing participants in their own education so that they can become independent lifetime learners.”]

and principles is an important competency, but is just one of many skills a new lawyer needs and may not be the most important one. According to an emerging consensus amongst legal educators, law schools must do more than teach doctrine, especially as technology makes access to legal information and knowledge much easier: “Lawyers need to know how to investigate legal issues they have not studied before, and how to keep abreast of changes in the law over the years. They also must recognize that in a world of many legally-trained people and multiple sources of legal information, knowing ‘the law’ alone will be insufficient to set them apart and cause a client to seek out their services.”<sup>148</sup> The law school experience needs to provide some added value. As such, legal educators now realize they must focus not only on cognitive knowledge, but also on identity and skills-based knowledge.<sup>149</sup>

The task of achieving a generally well-trained and practice-ready law graduate will be the challenge for the future of legal education. Recent reports suggest even more dramatic declines in law school applications in the United States than previously known,<sup>150</sup> with less dramatic though similar patterns in Canada.<sup>151</sup> The value of expensive legal education in a struggling economy is in question, which presents further obstacles to diversity and access. How the idea of “practice readiness” is defined will lie at the centre of the struggle between regulators and law schools over how best to make legal education relevant to professional preparedness. The outcome of this project will determine whether the future role of law schools is to shape, or be shaped by, the legal profession. For reasons based on sound evidence and pedagogical theory, and in decisions taken without regulatory pressure, many law schools committed to making experiential education a centrepiece of their reform agenda.<sup>152</sup> What has received very little attention is the extent to which integrating diversity goals with the pedagogical openings presented by the embrace of experiential education can not only bridge theory and practice, but also bring diverse perspectives and experiences to the core of the study of law.

---

<sup>148</sup> Thomas D Morgan, “The Changing Face of Legal Education: Its Impact on What it Means to Be a Lawyer” (2012) 45 Akron L Rev 811 at 832.

<sup>149</sup> Carnegie Report, *supra* note 4 at 210 (listing six tasks that law schools must perform: (1) teach basic knowledge and research; (2) build students’ capacity to engage in complex practice; (3) develop students’ professional judgment in conditions of uncertainty; (4) teach how to learn from experience; (5) introduce to professional role and identity; (6) encourage contributions to the public service).

<sup>150</sup> See LSAC data: <http://www.lsac.org/lisacresources/data/lisac-volume-summary.asp>

<sup>151</sup> See *e.g.* Ontario Universities’ Application Centre, *Law School Application Statistics* (2013), online: <<http://www.ouac.on.ca/statistics/law-school-application-statistics/>>.

<sup>152</sup> For example, in 2010, a university-wide mandate to promote experiential education was adopted after much deliberation at York University in Toronto, where Osgoode Hall Law School is housed. See York University White Paper “Building an Engaged University: Strategic Directions for York University 2010-2020” (April 2010) [stating that “there will be a significant increase in opportunities for students to participate in an experiential education activity, both domestically and internationally, as a component of their degree program”. Beginning with the 1L cohort of 2012-2013, the law school implemented a requirement to complete a designated amount of experiential credit hours in order to graduate from the JD program. See also Carnegie, *Id.*

### C. In From the Margins: Mainstreaming Experiential Education

The basic formula for experiential pedagogy (theory+practice+reflection) is not completely new to legal education, though it has attracted revitalized interest in recent years.<sup>153</sup> Practical training in law through apprenticeship was, up until the late 19<sup>th</sup> century, the primary method of legal education throughout the common law world.<sup>154</sup> The “science of law” approach, pioneered at Harvard Law School in the 1870s, quickly replaced apprenticeship and became the new norm.<sup>155</sup> This transition to university-based legal education came about both as legal practice became both more complex and the bar became more organized. The law school model was defined by characteristics that directly suppressed and delegitimized the practice-based approach to learning law: It relied on the case method and Socratic teaching, which prioritized the “mastery of principles and doctrines” as opposed to skills and habits; it appointed faculty members with no prior practice experience and cloistered them in ivory tower faculties; and it required a significant lengthening of the academic program to accommodate the growing amount of material deemed essential to the study of law.<sup>156</sup>

The Langdellian model was never impervious to criticism. The American Legal Realists of the early 20<sup>th</sup> century first raised the idea of “clinical” legal education as a complement to classroom-centred, case-focused studies.<sup>157</sup> The emergence of the Law and Society movement,<sup>158</sup> and the place of radical left politics on university campuses in the 1960s, generated a normative foundation from which modern clinical legal education was born.<sup>159</sup> It is thus that legal clinics departed from the “doctrines and principles” focus to develop an activist pedagogy that aspired to link lawyering practices to a reform social agenda.<sup>160</sup> The clinic was an incubator of “rebellious” lawyering and helped pave the way to transforming the conceptual understanding of

---

<sup>153</sup> Roy Stuckey et al, *Best Practices for Legal Education: A Vision and a Road Map* (Clinical Legal Education Association, 2007), online: <[http://www.cleaweb.org/Resources/Documents/best\\_practices-cover.pdf](http://www.cleaweb.org/Resources/Documents/best_practices-cover.pdf)>; Carnegie Report, *supra* note 4.

<sup>154</sup> Spencer, *supra* at 8-10.

<sup>155</sup> Spencer, *supra* at 20.

<sup>156</sup> Spencer, *supra* at 17-20.

<sup>157</sup> See e.g. Jerome Frank, “Why Not a Clinical Lawyer-School” (1933) 81 U Penn L Rev 907 at 910 (critiquing the use of case books and the focus on judicial opinion, to the exclusion of other relevant factors in teaching the law); Karl N Llewellyn, “The Current Crisis in Legal Education” (1948-1949) 1 J Legal Edu 211 (critiquing the case study method and urging a curricular shift in law school towards the acquisition of “craft skills”, an early call for clinical legal education);

<sup>158</sup> See Bryant Garth and Joyce Sterling, “From Legal Realism to Law and Society: Reshaping Law for the Last Stages of the Social Activist State” (1998) 32(2) L & Soc Rev 409.

<sup>159</sup> See Jeff Giddings et al., “The First Wave of Modern Clinical Legal Education: The United States, Britain, Canada, and Australia” in Frank S. Bloch ed., *The Global Clinical Movement* (Oxford: Oxford U. Press, 2011) at 3-8.

<sup>160</sup> Julie Macfarlane, “Bringing the Clinic into the 21st Century” (2009) 27 Windsor YB Access Just 35 at 36.

the lawyer, from stylized technician to dynamic social actor and law maker.<sup>161</sup> This approach was motivated by an opposition to the conventions that persisted in most law schools, along with a desire to increase access to justice for the poor and vulnerable. The role of the lawyer in the clinic was not simply to apply and explicate formal rules. Clinical students learned how to challenge and re-interpret rules, problem-solve and set norms in a fact-based, client specific, socially contingent context. To do this, it became apparent that the law student would need much more than grounding in abstract principles and doctrine.

Thus, the clinic provided a venue for student creativity and energy, while also highlighting the importance of skills training and “learning by doing”. Writing in 1974, just three years after the first clinical programs were established at Osgoode Hall Law School, doctrinal professor, W.H. Angus, observed that “we can no longer justify the narrowness of our teaching vehicles... Law schools have only begun to scratch the surface in clinical training.”<sup>162</sup> Indeed, in addition to teaching skills and providing access to justice to the poor, clinics helped students understand the law through the eyes of the people affected by it. This enabled the development of a vision of pedagogy and practice that would be responsive to the lived impact of law and the structural reality of power differentiation. Clinical educators saw legal education as an instrument of social transformation, wherein a commitment to justice could be promoted through the dual methods of client-centred lawyering and student-centred learning.<sup>163</sup>

Over the years, clinical programs have evolved to incorporate experiential pedagogical theories and reflect the established best practice formula, consisting of theoretical framing, practical instruction, and structured personal reflection.<sup>164</sup> Clinical legal education began on the periphery of the law school curriculum. Today, clinical programs exist at a majority of law schools and have overcome early antipathy to earn credence as a valuable and enriching way of teaching and learning. Not all current clinics are tied to a progressive or leftist political orientation, though many still are.<sup>165</sup> Some law faculties have clinics focusing on business law, intellectual

---

<sup>161</sup> Gerald Lopez, *Rebellious Lawyering: One Chicano's Vision of Progressive Law Practice* (Westview Press, 1992).

<sup>162</sup> W.H. Angus, “The Individual and the Bureaucracy: Judicial Review – Do We Need It?” (1974) 20 McGill LJ 177 at 211-212. Nearly 30 years later, the promise of clinical legal education in Canada was still largely unrealized. See Rose Voyvodic, “Considerable Promise and Troublesome Aspects” (2001) 20 Windsor YB Access Just 111 at 112.

<sup>163</sup> See Janet E Mosher, “Legal Education: Nemesis or Ally of Social Movements?” (1997) 35 Osgoode Hall LJ 613; Lucie E White, “The Transformative Potential of Clinical Legal Education” (1997) 35 Osgoode Hall LJ 603 at 605.

<sup>164</sup> See Nigel Duncan, “Ethical Practice and Clinical Legal Education” (2005) J Clinical Leg Ed 7 at 18 (arguing that the ideal clinical instructor is steeped in education theory and has practice experience).

<sup>165</sup> See Sameer M Ashar, “Law Clinics and Collective Mobilization” (2007-2008) 14 Clinical L Rev 355 (noting that clinical legal education has, from its inception, eluded clear definition, subject to debates about its purpose, meaning, and potential).

property law, appellate advocacy or in-house representation of government and corporations. Despite the embrace of clinical methods across subject areas and fields, clinical legal education remains conceptually distinct from mainstream legal education. Clinical programs, siloed and often physically removed or disconnected from the law school, are viewed as an alternative or complement to the all-important doctrinal instruction that occurs in the lecture hall. Students are aware of the value of a clinical program but also of the stigma that may arise from having “too much” clinical experience on a transcript. Such students may be seen as lacking the intellectual mitre to endure traditional instruction; assumed to be weak in doctrine or unable to engage in high-level legal analysis; or viewed simply as too caring or too political.

The historical marginalization of clinics has already been mitigated by the gradual mainstreaming of experiential education. The value of learning law in the clinics is, at minimum, threefold: First, it escapes the pedagogical focus on abstracting doctrine from facts and context, substantially widening what is relevant to learning and practising law. Secondly, clinical legal education offers real-life settings to apply diverse forms of legal knowledge and abilities to actual case studies, rewarding different student competencies and skill sets.<sup>166</sup> Thirdly, it employs critical reflection to nurture professional and personal growth, self-healing, and socially responsible and ethical behaviour through the appreciation of the lived impact of law and legal practice. Thus, the mainstreaming of clinical legal education offers possibilities beyond promoting access to justice for members of disadvantaged communities through on-campus and community clinics; fostering students’ political consciousness; and appealing to student desire for hands-on experience skills acquisition. The lessons learned from clinical education offer unique opportunities to further mainstream experiential learning by incorporating it into the core of legal education as a vehicle for advancing diversity pedagogy.

#### **D. Employing Experiential Education to Promote Diversity**

There are many ways in which experiential education can integrate and promote diversity pedagogy. First, it can break away from subject-area dominance of traditional legal education and seek understandings of legal problems through the eyes of differently affected individuals or groups. Such a socio-legal approach can remedy the depersonalizing, abstracting tendency in traditional legal analysis. It helps reorient the focus of study from the rule to the process. Finally, and perhaps most importantly, it teaches legal principles as contextualized by facts. This is in contrast to the case method approach of extricating the ratio, and then rationalizing the facts according to pre-set analytical frames. Such shift allows for destabilizing

---

<sup>166</sup> Voyvodic, *supra* at 117.



epistemological assumptions, and widens the scope for diverse contributions to the production of legally relevant knowledge.<sup>167</sup>

Secondly, experiential learning promotes diversity because it generally employs a diversity of evaluation methods than does traditional legal education.<sup>168</sup> It is well known that end-of-term, high-stakes examinations reward particular cognitive skills that only narrowly capture the skill sets required to be a good lawyer.<sup>169</sup> Evaluation in an experiential learning setting tends to gauge a student's progress over time and through the use of an assortment of evaluative tools. This allows students' talents both to be demonstrated in various ways and to develop at their own pace. It provides an educational setting where different kinds of students will perform well; it upsets the grades hierarchy that takes hold so quickly in law school; and it may help doctrinally strong students identify other skills that need development prior to encountering difficulties in real-world practice.

Thirdly, experiential pedagogy is more collaborative, both horizontally and vertically. The experiential teacher is fundamentally different in style, approach, and method as compared to the traditional lecturer. The lecture style is detached, didactic and impersonal. To the extent that it is dialectical, it thrives on confrontation, and is burdened by a tradition of classroom authoritarianism that has unproven pedagogical value (e.g. Socratic method).<sup>170</sup> Experiential education follows a model of student-centred education, whereby the instructor is a mentor or guide, facilitating the student's self-learning. The student discovers and produces the knowledge herself, making connections through the act of doing. As Dewey put it, "learning naturally results" from being placed in a setting with "something to do",<sup>171</sup> rather than in the role of passive recipient of the instructor's knowledge, as in lecture-based learning. Similarly, because experiential methods encourage cooperation with fellow students and make the interests of clients (live or simulated) paramount, students are more likely to work as collaborators and allies in problem solving and knowledge production, rather than as competitors pursuing narrow personal interests (i.e., scarce high grades).

The ways in which experiential education promotes diversity also align with traits commonly attributed to members of the "millennial generation", who now constitute

---

<sup>167</sup> See Crenshaw, "Toward a Race-Conscious Pedagogy", *supra*.

<sup>168</sup> See Antoinette Sedillo Lopez, "Leading Change in Legal Education—Educating Lawyers and Best Practices: Good News for Diversity" (2008) 31 Seattle U L Rev 775 at 777-779.

<sup>169</sup> Ian Weinstein, "Testing Multiple Intelligences: Comparing Evaluation by Simulation and Written Exam" (2001-2002) 8 Clinical L Rev 247 at 248 (observing that law school grades are not a useful measure or predictor of success as a lawyer).

<sup>170</sup> Todd E. Pettys, "The Analytic Classroom" (2012) 60 Buff L Rev 1255 at 1268-1274 [noting that pure Socratic teaching has disappeared from US law schools for a variety of reasons, including inefficiency and alienation produced by it].

<sup>171</sup> Dewey, *supra* note 133.

the majority of the North American law student body.<sup>172</sup> Such characteristics include the desire to work collaboratively, to be mentored and nurtured, a drive to do good in the world, and an easy comfort with diversity and difference.<sup>173</sup> While experiential education helps mitigate the deficiencies in traditional education by showing legal rules and practices in action, an experiential approach to legal education need not be predicated on an outright rejection of classroom or lecture based learning. What is clear is that each style, or pedagogical mode, rewards different skillsets, delivers distinct educational outputs, and may naturally cater to different types of students. What is also true is that, in the appropriate conditions and with competent instruction, any law student should be able to learn under either mode. The ideal legal education would include elements of both doctrinal and experiential learning.<sup>174</sup> Indeed, an important task for scholarship on legal education in the coming years will be to analyze and prescribe methods for integrating and harmonizing doctrinal and experiential learning.

The strongest accounts of experiential education champion it as the “most effective pedagogic device for forcing students to address a full agenda of intellectual and social issues.”<sup>175</sup> The live-client experience gives students the opportunity to deal with “unstructured situations,” learn how think through actual professional issues, and study and strategize the law in complex social contexts. Applying the law in the complexities of context and as part of actual legal process could make experiential learning a superior method of understanding doctrine, as compared to extracting abstract principles from appellate dicta. This, of course, depends on the availability of sufficient theoretical grounding through competent supervision and faculty support throughout the learning process. Such is essential to ensure that the value of hands-on experience is not reduced to mere skills acquisition.

It is also important to note that not all experiential education occurs in a live-client clinic, and not all of the benefits of experiential learning will necessarily accrue to the student in each and every one of these settings. Experiential education provides general benefits simply from learning by doing, with reflection. This formula can be delivered in a rather diverse array of formats that is broader than what is traditionally understood as clinical legal education. It might include, for example, simulated experiences, such as role-play and mootings. The thing that makes it experiential is

---

<sup>172</sup> Emily A. Benfer & Colleen F. Shanahan, “Educating the Invisibles: Strategies for Teaching the Millennial Generation in Law School” (2013) 20 Clinical L Rev 1 [summarizing research about millennials]. The authors make the case for generational generalizations while acknowledging that characteristics cannot be presumptively attributed to all members of the generation.]

<sup>173</sup> *Ibid* at 7-9 [describing members of this generation as “comfortable in both virtual and physical space... appreciate and expect diversity and are collaborative... trusting of people over 30 and eager to learn from and work with older mentors... confident, team oriented, conventional, achieving, and ambitious... are service and cause-oriented and want to contribute to the greater good... are forward looking, opportunity driven, ready to contribute... know what they want and believe they can achieve it... has a greater awareness of and comfort level with diversity of all kinds than previous generations.”]

<sup>174</sup> This is a claim that is echoed in policy documents, such as the Carnegie Report. See *supra* note 4.

<sup>175</sup> Voyvodic, *supra* at 111.

fundamentally not whether there is a real client or an actual issue, but rather whether the form of instruction is problem-based. That is, whether it includes the application of theory and doctrine to a practical situation, the opportunity to engage in the act of doing, and a structure for reflection about performance and the process afterwards.

If experiential education is delivered in a manner that conforms to the best practices, as they evolve, diversity pedagogy can be expected to contribute positively to legal education in at least four ways:

1. *Subverting the myth of universality.* Legal education excels when it ensures space for different voices and distinct or overlapping perspectives on, and experiences with, the law and when it encourages students to craft their own professional identity, rather than try to fit into a predetermined role.
2. *Deconstructing power relationships.* Law schools can realign power and can empower students not just with the credential of a law degree, but also with a consciousness of diversity involving professional responsibility, ethics, empathy, and competence. This portrays the lawyer as an agent of change.
3. Stimulating *culture shift* in the profession organically through training students to develop a socially responsible professional self-image, to be contributors to the profession, and to realize the transformative potential of their role as lawyers in the broader society. As opposed to reading law as a body of fixed and determinate text, this kind of diversity invites students to view law as both normatively pluralistic and strategically positivist.
4. *Making lawyers better communicators*, who are able to explain and translate the law to clients across various sources of difference. In this sense, diversity necessarily incorporates aspects of transnational fluency, inter-cultural sensitivity and global awareness.

## VI. CONCLUSION

The implications of embracing a pedagogy of diversity as a governing feature of contemporary legal education would be significant. Fully implemented, diversity pedagogy would enable the promotion not only of basic principles of access and representation, but also of a thicker conception of diversity as a normative goal, shaped by values of equality and pluralistic understandings of law and lawyering. Diversity pedagogy can, and should, touch on all aspects of law school life, from the doctrinal classroom to clinical placements to career counselling. The kinds of outcomes that will emerge depend on the particular context and circumstances in any given setting. For this reason, educators should focus on diversity-enhancing processes rather than on achieving specific outcomes. With time, best practices will emerge.

The tools for implementing the goals of diversity pedagogy are to be found in innovative teaching methods. The embrace of experiential education offers a timely opportunity to harmonize different strands of law school reform to meet mutually reinforcing ends. What emerges from the aspiration of diversity pedagogy is a model of professional competence and skill that includes a series of attractive and admirable professional qualities, which can be contrasted with outmoded and discredited approaches to legal professionalism. The diversity-trained law student will be emotionally intelligent, as opposed to dispassionate or suppressed; experientially informed, as opposed to abstracted and artificially “neutral”; empathetic and personally invested, as opposed to detached and indifferent; critical and creative, not just within established doctrinal boundaries but also in theoretical inquiry and practice techniques; and, as such, rather than being doctrinaire or merely strategic about ethical rules, the diversity-trained law student will engage in critical self-reflection and nurture a professional culture rooted in ethical conduct.